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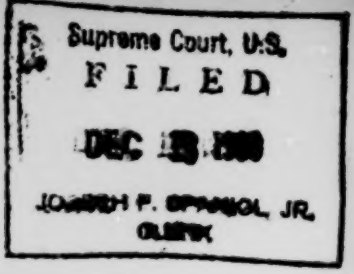

No

In The Supreme Court of the United States.

OCTOBER TERM 1990

ROLAND M. and MIRIAM M.,
PETITIONERS

v.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
RESPONDENTS

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Is appellate review of a district court decision in an action under the Education of the Handicapped Act (EHA), 20 U.S.C. §1415(e)(2), that an Individual Educational Plan (IEP) is adequate and appropriate, de novo, where the district court heard the case only on the State administrative record?

2. Is the jurisdictional time limitation contained in a state administrative procedure act to be applied in determining the timeliness of a cross-claim by a local school committee attacking so much of a decision of a state agency hearing IEP appeals as decides that parents of a handicapped child are entitled to reimbursement?

3. Is a party entitled to present additional testimony in the nature of expert witnesses to the District Court in an action brought under EHA where the testimony offered by these witnesses was not part of the administrative record?

4. Should a court of appeals be required to rehear en banc any case in which a panel of that court has decided a question of law so as to create a conflict among the circuits?

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No.

In The Supreme Court of the United States.

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THE CONCORD SCHOOL COMMITTEE, ET AL.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners pray that a writ of certiorari issue to review and reverse a judgment of the United States Court of Appeals for the First Circuit issued on August 3, 1990 and orders of September 14, 1990 denying a petition for rehearing and rehearing en banc.

Citations to Opinions Below.

The following opinions are reprinted in the recorded appendix. They are unreported unless otherwise noted.

1.Amended Decision of the Bureau of Special Education Appeals of the Commonwealth of Massachusetts dated June 11, 1987 as amended on June 29, 1987.

2. Decision of the Bureau of Special Education Appeals of the Commonwealth of Massachusetts dated July 24, 1987.

3. Decision of the Bureau of Special Education Appeals of the Commonwealth of Massachusetts dated August 24, 1988.

4. Pre-trial Order of the United States District Court for the District of Massachusetts, Zobel, J., dated January 19, 1989.

5. Order allowing Motion In Limine precluding Plaintiffs from presenting expert witnesses (Endorsement dated March 3, 1989 on Concord's motion).

6. Memorandum of Decision of the United States District Court, Zobel, J., for the District of Massachusetts dated October 27, 1989.

7. Opinion of the United States Court of or the First Circuit dated August 3, 1990 and reported at 910 F.2d 983 (Ist Cir. 1990).

8. Judgment of the United States Court of Appeals for the First Circuit entered August 3,1990.

9. Opinion of the United States Court of Appeals for First Circuit denying a Motion for Rehearing and Rehearing En Banc dated September 14, 1990.

Jurisdiction

On August 3, 1990 the United States Court of Appeals for the First Circuit entered judgment affirming a judgment of the United States District Court for the District of Massachusetts. Plaintiffs filed and served a Motion for Rehearing and a separate Suggestion of Rehearing En Banc on August 17, 1990. On September 14, 1990 the Petition for Rehearing and the Suggestion of Rehearing En Banc were denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Citations.

A Statutory Addendum Begins on page 19

Statement of the Case.

Somewhat arbitrarily, we begin our statement in the 1985-1986 school year when Matthew, a handicapped child (whose parents are Petitioners here), was in his fifth year in the Concord (Massachusetts) public schools (Concord). His classroom teacher was Mr. Corey, who was probably the most effective teacher that Concord had offered Matthew. However, Matthew, according to his physician, suffered from a wide variety of neurological and neurologicaliy engendered disorders,[1] and as a result, his learning style had been characterized, through the end of the 1985-1986 school year,by great difficulty in remaining focused on the task at hand and easy susceptibility to distraction. He was not accepted by his peers, either in or out of school. In Mr. Corey's class Matthew's only "friend" was a young man who often engaged in destructive and bizarre behavior that Matthew tended to imitate.

Aside from his inability to develop peer relationships, Matthew also demonstrated, throughout his two years in Mr. Corey's class, inappropriate and worrisome behaviors at home, including talking to himself for hours at a time, destroying furniture and defacing walls, eating very rapidly and sloppily, and refusing (or being unable) to take care of himself in basic ways including dressing. Since Matthew was a sensitive child with considerable insight into his problems, he was often anxious and depressed.A poor self-image exacerbated his inappropriate behavior, which further distanced him from his peers yet Matthew tested as

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[1] According to his physician, Matthew suffered from a severe attention deficit disorder and a variety of other complex problems including visual motor, visual perceptual, visual tracing, fine motor (e.g., handwriting), and gross motor coordination difficulties.

a student of average intelligence, and his physicians believed he had the then unrealized potential to make academic progress.

In 1986 Petitioners placed Matthew in an intensive summer program at the Landmark School (Landmark), a private school for children with learning disabilities in Beverly, Massachusetts. He made stunning progress. By the end of the summer, at Mr. Corey's suggestion, they rejected Concord's proposed placement in a public school - Concord at this time had not yet prepared an Individual Educational Plan (IEP) for 1986-1987 for Matthew - and enrolled him for the coming school year in the residential program at Landmark The Bureau of Special Education Appeals of the Commonwealth of Massachusetts (BESA) held six days of hearing on the appropriate placement for Matthew for school year 19861987. On June 29, 1987 the hearing officer (hearing officer no. I) rendered an amended decision (correcting a decision of June 11, 1987), which was clarified on July 24, 1987, after Petitioners and Concord requested reconsideration. Her basic ruling was that Petitioners had justifiably placed Matthew in Landmark's program for the first term of the 1986-1987 school year on the grounds (a) that it had been recommended by a Concord teacher, Mr. Corey (b) that Concord had made misrepresentations to Petitioners and (c) that Concord had not prepared a timely IEP and (d) that the placement prepared by Concord did not include, as it should have, an after-school supplement. She also found that the placement chosen by Concord for its public schools was the appropriate placement for the balance of the year.She ordered Concord to reimburse Petitioners for the cost of placement in Landmark for the first term of 1986-1987 (3a-9a)

Petitioners promptly filed a civil action under Title 20 U.S.C. Section 1415 (e)(2) seeking enforcement of the reimbursement order, reversal of so much of the order as determined Concord to be appropriate placement for the balance of the 1986-1987 school year, and counsel fees. On December 11, 1987, Concord, after extending on several occasions it time to respond, filed an answer and a cross-claim against BSEA seeking reversal of the order of

reimbursement.

In the meantime on May 16,1987, Concord, without any request from Petitioners or before hearing officer no. 1 rendered any decision, convened a team to prepare an IEP for Matthew for 1987-1988 though he was then a student at Landmark. Petitioners attended the team meeting. At it they spoke glowingly of Matthew's progress in the year at Landmark and their hopes that he would be able to remain at Landmark for the ensuing school year. In June of 1987, Concord prepared a "IEP," under which Matthew would have spent the 1987-1988 school year at the Peabody School, a Concord public school. Petitioners rejected it and enrolled Matthew for a second year a Landmark.

In January of 1988, after the District Court called a conference to schedule the case for hearing, Concord appealed the parents' rejection of the 1987-1988 IEP to BSEA and asked the Court to stay its proceedings while Concord's appeal was pending. The Court did so. Hearings were held on February 24, March 8, March 10, March 28, April 6, April 29 and May 25, 1988. It is clear from the testimony at these hearings that both academically and socially the two years that Matthew spent at the Landmark School were the most productive and happiest years of his life. There is no dispute that in the course of these two years Matthew was transformed from a hostile, disagreeable child whose behavior at home, at school and in other situations was often, if not always, inappropriate to a reasonably self-disciplined child whose behavior, if not always appropriate, was usually at least well within the bounds that might be expected for a child of his age and background. Matthew even learned to like and read books.

On August 24, 1988 the hearing officer (hearing officer no. 2) rendered a decision. Basically it held that the Concord IEP was appropriate because (a) procedural defects in Concord's adaption of the IEP were excusable, (b) Concord personnel have more certificates and degrees than Landmark's and (c) Petitioners' counsel had taken the position at the hearings that Concord was not entitled to call Petitioners' experts as witnesses. (pg. 42a-48a) Petitioners amended their already pending Complaint to include an attack upon the 1988 decision upon seven different

grounds.

On March 3, 1989, the District Court allowed a Motion in Limine by Concord to prevent Petitioners from offering expert testimony at trial (61a), and Petitioners filed an offer of proof of the expert's credentials and of what their testimony, if allowed, would be. Specifically, if permitted to testify, Dr. Marcel Kinsbourne, a pediatric psychiatrist, pediatric neurologist and a pediatrician, would have testified that he has continued to treat with Matthew and that in his opinion appropriate placement for the school year 1987-1988 was in the residential program of the Landmark School and that placement of Matthew in the Concord Public Schools in accordance with Concord's 1987-1988 IEP would have been inappropriate.

The basis for Dr. Kinsbourne's opinion would have been as follows: Matthew has an unusual personality disorder and attention deficit disorder, which prior to his involvement with the Landmark were not being addressed in the Concord Public Schools and could not be addressed in the Concord Public Schools. Even the most efficient instruction of Matthew would not work in the absence of individualized instructions, required for Matthew a 24-hour day program. For the two years in question his needs were both social and academic and these needs could not be separated. Matthew was able to make significant progress at the Landmark School, in part, because at Landmark he was able to learn strategies of getting on with his peers and, once having mastered these strategies, was able to function both socially and academically.

Dr. Bruce Cushna, a psychologist, would have testified that he has continued since 1987 to treat Matthew and has formed professional opinions concerning his appropriate placement for the school year 1987-1988, which would have been in Landmark's residential program and that his placement in the Concord School according to the Concord IEP would have been inappropriate. Matthew's return to the Concord Public Schools would have been detrimental to him; Concord treated Matthew while he was a student there as if he were retarded and unable to learn; the Concord Public Schools proved unable to cope with Matthew's problems; and the Landmark School substantially improved

Matthew's academic performance.

Dr. Michael Marcus, a psychotherapist, would have testified that placement of Matthew in the Concord Public Schools for the school year 1986-1987 would have been extremely detrimental to him since the Concord Schools had caused him to have a very negative self-image and continued exposure to the same students would have simply exacerbated the problem stemming from that negative self-image. It was, therefore, necessary for Matthew's placement to be changed to one in which he was surrounded by other persons who shared the same problems that he did. He would also have been expected to testify that if the appropriate placement for Matthew for the first term of the 1986-1987 school year was the residential placement at the Landmark School, then transferring him in the course of that year to the Peabody School would have left the year as a wasted year in his education. Drs.. Kinsbourne and Cushna testified at the 1986-1987 hearings but not at the 1987-1988 hearings, whereas Dr. Marcus testified at the 1987-1988 hearings but not the 1986-1987. The testimony of Drs.. Kinsbourne and Cushna in the District Court concerned 1987-1988 and that of Dr.Marcus, 1986-1987. (See pgs. 2a and 28a)

On April 7, 1989, the District Court held a "trial," which was in reality an oral argument with respect to the transcripts of the administrative hearings and the administrative exhibits, the administrative decisions, and the findings.

On October 27, 1989 the Court entered judgment affirming so much of BSEA's decision as found Concord's proposed placement in its public schools appropriate for the second term of 1986-1987 and all of 1987-1988 and annulling so much of the decision as ordered Concord to fund placement for the first term of 1986-1987 (73a) After denial of a Rule 59 motion of Petitioners on November 22, 1989, which pointed out the failure of the Court to deal with various issues that had been raised by Petitioners, including the issue of whether Concord's cross-claim was time barred. Petitioners appealed.

The First Circuit heard oral argument on June 4, 1990. On August 3, 1990 the Court, Selya, J., in an opinion joined

by Judge Bownes, affirmed.[2](pg.74a) Petitioners filed a petition for rehearing on August 17, 1990 and, on the same day, a suggestion of rehearing en banc pointing out that the decision was in conflict on two points with decisions in other circuits and, on a third point, in conflict with a decision of this Court, its own prior decision, and decisions of other circuits. On September 14, 1990, both rehearing and rehearing en banc were denied.(pg. 102a)

Amplification of Reasons Relied on for the Allowance of the Writ.

I. REVIEW BY A COURT OF APPEALS OF A DECISION OF A UNITED STATES DISTRICT COURT DETERMINING THAT AN IEP DEVELOPED FOR A HANDICAPPED CHILD IS ADEQUATE AND APPROPRIATE IS DE NOVO,ESPECIALLY WHERE NO EVIDENCE OTHER THAN THE ADMINISTRATIVE RECORDS AND THE ADMINISTRATIVE DECISION HAS BEEN RECEIVED.

At oral argument, Judge Selya questioned Petitioners' counsel about the scope of review of the District Court's decision that the IEP's were adequate and appropriate, and Petitioners' counsel replied that it was de novo. The following day, Petitioners' counsel sent a letter to the Clerk pursuant to Rule 28(j) of the F.R.A.P., citing Lachman v. Illinois State Board of Education, 852 F.2d 290, 293 (7th Cir. 1988) for this proposition. The Court of Appeals disagreed, holding, 910 F.2d at 990, pg. 81a :

> The question of whether an IEP is "adequate and appropriate" is a mixed question of fact and law. Accord Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293 (7th Cir.), cert. denied, - U.S. -, 109 S.Ct. 308, 102 L.Ed.2d 327 (1988); Gregory K. v.

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[2] Judge Souter, having been nominated by the President for a

seat on this Court, did not participate in the decision.

> Longview School Dist., 811 F.2d 1307, 1310 (9th Cir. 1987). Like other mixed questions, measuring the adequacy and appropriateness of an IEP asks nisi prius to determine whether certain facts possess, or lack, legal significance in a given case. In short, the district court is required to make an evaluative judgment, applying "a legal standard to a particular set of facts." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S.Ct. 2126, 2133, 48 L.Ed.2d 757 (1976).
>
> Absent a showing that the wrong legal rule was employed, we have rather consistently taken the view that the district court's answer to a mixed fact/law question is reviewable only for clear error.

In suggesting rehearing en banc on this point, Petitioners also called the Court's attention to other rulings that appeliate review of the adequacy of an IEP is de novo: Gregory v. Longview School District ,811 F.2d 1307,1310 (9th Cir. 1987); Department of Education. State of Hawaii v.Katherine D., 727 F.2d 809, 814 n.2 (9th Cir. 1983); Wilson v. Marana Unified School District No. 6 of Pima County, 735 F.2d 1178, 1181 (9th Cir. 1984).

Under Rule 10.1(a) the existence of a conflict among the circuits is an appropriate basis for invoking this Court's certiorari jurisdiction.Moreover, this ruling seems to be erroneous for a number of reasons. One is that mixed questions of fact and law are not normally reviewed only for "clear error." Moore's Federal Practice ¶ 52.05[1], p.52-121 states:

> When a finding is a composite of fact and law it is not binding where the factual finding is induced by an error of law or where, although the factual finding is sound, the composite conclusion is based on an error of law.

Wright and Miller, Federal Practice and Procedure, Volume 9, Ch. 7, §2589, p.753 states:

> Many issues in a law suit involve elements of both law and fact. Whether these be referred to as mixed questions of law and fact, or legal inferences from the facts, or the application of law to the facts, there is substantial authority that they are not protected by the "clearly erroneous" rule and are freely reviewable.

A second reason is that a determination that an IEP offers a child a "free appropriate public education" does no more than repeat the language of a statute, 20 U.S.C. §1400(c).[3] Such a statement is almost by definition a statement of law. See Beyer v. LeFevre, 186 U.S. 114, 117, 119 (1902); Baumgartner v. United States 322 U.S. 665, 670-671 (1944).

To be sure, in some cases a determination that an IEP offers a free appropriate public education may rest upon findings of fact, and presumably these findings would not under Rule 52(a) of the F.R.Civ.P. be set aside "unless clearly erroneous." In this case, however, the district court had no "evidence" before it other than the evidence, testimonial and documentary, received by BSEA and the BSEA decisions. As this Court stated in Bose Corp.v. Consumers Union of United States Inc., 466 U.S. 485, 500 n.16 quoting from Baumgartner, supra:

> The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based.

Where review is confined to the record, then it is subject to the principle "that district courts are generally accorded no deference in their review of agency actions where review is

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[3] It will be noted that the Court of Appeals referred to the "adequacy and appropriateness of an IEP," but this language, derived from the First Circuit's opinion in Burlington v. Department of Education, 736 F.2d 773, 788 (1984) aff'd on other grounds 471 U.S. 359 (1985), is no more than a

paraphrase of the statute.
limited to the administrative record." Virginia Agr. Growers Ass'n. Inc. v. Donovan, 774 F.2d 89, 93 (4th Cir. 1985) citing Asarco Inc. v. United States E.P.A., 616 F.2d 1153, 1161 (9th Cir. 1980). See also Sabin v. Butz, 515 F.2d 1061, 1067 (lOth Cir. 1975).

Sabin, supra, was heard on cross motions for summary judgment. Although neither party moved for summary judgment in this case, its posture when it left the district court was in exactly the same posture as it would have been if it had been heard on such a motions Indeed, it is as if it had been heard on a most unusual kind of summary judgment, procedure, in which Petitioners were forced to accept a particular record and could offer no evidence by affidavits or otherwise to vary that record. In these circumstances, to refer to "findings of fact" and to speak of reviewing them only for clear error is to assume that there was fact-finding when there was none. That judgments based upon orders granting summary judgment are reviewed de novo is too clear for extended discussion. Among the recent cases are Chieders v. Joseph, 842 F.2d 689, 693 (3rd Cir. 1988); Diebold v. Civil Service Comm., 611 F.2d 697, 699 (8th Cir. 1979); Securities & Exchange Comm. v. Belmont Reid & Co. inc., 794 F.2d 1388, 1390 (9th Cir. 1986); Tackitt v. Prudential Ins. Co. of America, 758 F.2d 1572, 1574 (llth Cir. 1985).

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT CONCORD'S CROSS-CLAIM WAS TIME BARRED.

Several courts have decided that the appropriate statute of limitations to be applied to actions under Title 20 U.S.C. §1415(e)(2) is the analogous state statute for bringing actions to review administrative decisions. Department of Education v. Carl D., 695 F.2d 1154, 1157 (9th Cir. 1983); Adler by Adler v. Education Department of New York, 760 F.2d 454, 457-458 (2d Cir. (1985); Spiegler v. District of Columbia, 856 F.2d 462, 463-464 (D.C. Cir. 1989). Other circuits, however, have rejected time limits found in

analogous state administrative procedure acts for determining when actions under §1415(e)(2) are time barred. See Janzen v. Knox County Board of Education, 790 F.2d 484, 488 (6th Cir. 1986) and cases discussed; Schimmel by Schimmel v. Spillane, 819 F.2d 477, 480 (4th Cir. 1987). In the present case, Petitioners asked the Court of Appeals to rule that the thirty-day time restriction found in Mass. G.L. c.30A, §14(1) was applicable and that, therefore, Concord's cross-claim was time barred.[4] In dictum, 910 F.2d at p.999 n.10, the First Circuit indicated that "the timeliness of the cross-claim, if germain at all, was likely governed not by a statute of limitations but by the equitable doctrine of laches."(pg. 98a) The holding of the Court on this point, however, 910 F.2d at 998-999 was that since Petitioners did not raise the issue in their pre-trial memorandum (although they most certainly did argue it at the hearing held by the District Court), the point was waived. (pg.96a-98a)

We shall assume for purposes of this argument that a normal statute of limitations can, like any defense, be waived and that it can be waived even if it is properly asserted in an answer. However, as Petitioners argued in their original brief and also in their petition for rehearing, the

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[4] Concord offered no disagreement. At pages 40-41 of its brief it stated:

> Although the EHA does not specifically incorporate any timelines for the initiation of such an appeal, various courts have interpreted the civil action requirements as incorporating analogous state statutes for the initiation of claims in the state courts. See, e.g., Spiegler v. District of Columbia, 866 F.2d 462, 463-464 (D.C. Cir. 1989). In Massachusetts,

analogous Massachusetts statute, c.30A, §14(1), contains a time limit that is in the nature of a jurisdictional bar. Westland Housing Corp. v. Commissioner of Insurance, 346 Mass. 556, 558, 194 N.E.2d 714, 716 (1963); Flynn v. Contributory Retirement Appeals Board, 17 Mass. App.Ct. 668, 669-670, 461 N.E.2d 1225, 1227 (1984). Massachusetts law is also rather clear in requiring that any party seeking to attack an agency decision file its own timely complaint; mere intervention in the complaint of another is insufficient. Group Insurance Commn. v. Labor Relations Commn., 381 Mass.199, 206-207, 408 N.E.2d 851 (1980).

This Court has indicated on several occasions that unless it would defeat some Federal policy, courts "should not unravel state limitations rules." Hardin v. Straub, 109 S.Ct. 1998, 2000 (1989); Johnson v. Railway Express Agency 421 U.S. 454, 464 (1975); Board of Regents University of New York v. Tomanio, 446 U.S. 478, 482, 486 (1980). If the time bar in G.L. c.30A, §14(1) applied, the District Court was without jurisdiction of Concord's cross-claim and so, of course, was the Court of Appeals. Thus, the First Circuit should have decided the issue squarely. Questions of jurisdiction can be raised at any time. Morris v. Gilmer, 129 U.S. 315, 325-326 (1889).

> G.L.M. c.30A, §14 governs the appeal of state administrative proceedings to the state courts, and imposes a thirty (30) day limitation for the initiation of such claims. G.L.M. c.30A, §14(1). Thus, in order to initiate a claim for review of an administrative adjudicatory proceeding in the federal courts, it is arguable that a thirty (30) day time limitation for the initiation of such claims would be applicable.

BSEA, which had filed an answer raising the defense that Concord's cross-claim against it (Petitioners were not parties to the cross-claim) was time barred, took no formal part whatsoever in the District Court hearing or the appeal.

On reaching the issue, the court should have ruled that not laches but the state administrative procedure act sets the proper time limitations for bringing any action attacking a decision of BSEA, whether by original complaint or cross-claim.[5] Petitioners recognize that actions under §1415(e)(2) are somewhat different from the general run of petitions for review under administrative procedures act in that the reviewing court is required to hear "additional evidence." See Part III of the Amplification of Reasons. Nevertheless, the primary question in most EHA cases is whether to affirm or reverse a series of administrative decisions culminating in the decision after the so-called "Due Process Hearing." See 20 U.S.C. §1415(b)-(d). Moreover, to the extent that time limits for seeking administrative review seem to be shorter than other statutes of limitation, the requirement that any party aggrieved by the administrative decision take prompt action is desirable. As was stated by the First Circuit in this case, 910 F.2d at 1000, pg. 99a:.

> As the case before us aptly illustrates, placement disputes may take years to wind their way through the administrative/judicial labyrinth.

There is no point in lengthening this process by applying longer statutes of limitations or indeterminate concepts such as lacher to the time for bringing §1415(e)(2) actions.

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[5] There can be no doubt that if Concord's action had been brought in a Massachusetts court, it would have been governed by Mass. G.L. c.3OA, §14. See Amherst-Pelham Regional School Comm. v. Department of Education, 376 Mass. 480, 485, 495, 381 N.E.2d 922 (1978).

III. THE LOWER COURT'S HOLDING THAT PETITIONERS COULD NOT OFFER EXPERT TESTIMONY TO THE DISTRICT COURT TO SHOW THAT NEITHER IEP PROPOSED AN APPROPRIATE PLACEMENT FOR MATTHEW EFFECTIVELY LEAVES DISTRICT COURT PROCEEDINGS UNDER 20 U.S.C. §1415(e)(2) AS A FORM OF REVIEW CONFINED TO THE RECORD, IN DIRECT CONTRAVENTION OF THIS COURT'S RULING IN HENDRICK HUDSON DISTRICT BOARD OF EDUCATION V. ROWLEY, 458 U.S. 176 (1982).

In School Committee of Burlington v. Department of Education, 736 F.2d 773, 790-791 (1984), the First Circuit, concerned that by offering evidence in §1415(e)(2) proceedings parties might "undercut" the administrative proceedings and, thus, the "due weight" to be given to administrative decisions, effectively limited district courts to receiving fresh testimony only in unusual circumstances such as "gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." 736 F.2d at 790. It further stated however, id 790-791:

> We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing. We believe that, although an appropriate limit in many cases, a rigid rule to this effect would unduly limit a court's discretion and constrict its ability to form the independent judgment Congress expressly directed. A salient effect of defendants' proposed rule would be to limit expert testimony to the administrative hearing. Our view of the cases involving the Act reveals that in many instances the district court found expert testimony helpful in illuminating the nature of the controversy

> and relied on it in its decisional process. There would be some valid reasons for not presenting some or all expert testimony before the state agency. Experts are expensive - the parties at the state level may feel that their cases can be adequately made with less backup, especially since the administrative hearing in Massachusetts is conducted by an expert. We also recognize that in many instances experts who have testified at the administrative hearing will be bringing the court up to date on the child's progress from the time of the hearing to the trial. It would be difficult to draw a sharp line between what had or could have been testified to at the administrative hearing and the trial testimony.

Although this Court granted certiorari, 469 U.S. 1071 (1984), it excluded this issue, raised in the petition as the third question, from its order.

In the present case, however, the First Circuit went considerably further and, affirming the ruling of the District Court, held that because Plaintiffs had made a conscious decision not to present certain experts at the administrative hearings, they could not offer their admittedly relevant testimony in court. 910 F..2d at 996-997, pg. 92a-95a. The result, it would appear is that except in unusual circumstances, in the First Circuit hearings by the district courts will be confined to review of the administrative record. See, especially, 910 F.2d at 997, n.7, 93a-94a.

It is true that one way to give due weight to administrative decisions in EHA cases would be to prevent or substantially restrict the courts from receiving evidence other than the administrative record. However, in Rowley, 458 U.S. at 205, this Court, considering the legislative history of §1415(e)(2), not to mention its specific language, explicitly repudiated such a restriction, "for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts." Thus, Rule 10.1(c) of the Rules of this Court indicates that certiorari should be granted since the First Circuit "has decided a federal question in a way that conflicts with applicable decisions of this Court."

We have found no case that begins to place the restrictions on receipt of "additional evidence," Title 20 U.S.C. §1415(e)(2), that the First Circuit has imposed here. That courts hearing actions under 20 U.S.C. §1415(e)(2) should hear "additional" evidence, if relevant, appears to be settled. E.g., Burke County Bd. of Education v. Denton 895 F.2d 973, 981 (4th Cir.1990). Even more recently, the Sixth Circuit, in The Metropolitan Goverment of Nashville and Davidson Cty. v. Cook 917 F.2d 232,234, (1990) noted,with respect to the First Circuit's more limited holding of Burlington, under which Petitioners should have been permitted to offer expert testimony excluded by the District Court,

> Insofar as this language [in Burlington] suggests that additional evidence is admissible only in limited circumstances, such as to supplement or fill in the gaps in the evidence previously introduced, we decline to adopt the position taken by the First Circuit. "Additional," in its ordinary usage, implies something that is added, or something that exists by way of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add".

Accord: Barwacz v. Michigan Dept. of Education,681 F.Supp. 427, 430-431 (W.D. Mich. 1988). That the Sixth Circuit would not have approved the holding of the First Circuit in the present case is a fortiori. Thus, Rule 10.1(a) is implicated in this question as well.

IV. A COURT OF APPEALS SHOULD REHEAR EN BANC ANY CASE IN WHICH A PANEL HAS DECIDED A QUESTION OF LAW SO AS TO CREATE A CONFLICT AMONG THE CIRCUITS.

Seeking rehearing en banc, Plantiffs specifically called the Court's attention to Aldens, Inc. v. Miller,610 F.2d 538, 541 (8th Cir. 1979) cert. denied 446 U.S. 919 (1980).

This case holds:

> Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system. See dissenting opinion of White, J., in Brown Transport Corp v. Atcon Inc., 439 U.S. 1014, 99 S.Ct. 626, 58 L.Ed.2d 687 (1978), and the opinion of Burger, J., appended thereto.

Accord: United States v. Coleman,707 F.2d 374, 380 (9th Cir. 1983) and case cited.

If Aldens and Coleman spoke to a point of urgency and Petitioners submit that they did one way of possibly cutting down on conflicts among the circuits is to require that any case in which a panel decision has created the conflict be reheard en banc. Since with respect to point 1, the scope of review, the Panel's decision most certainly created a conflict among the circuits, rehearing en banc was appropriate.

Conclusion

For the reasons given a writ of certiorari should issue to review and reverse the decision of the First Circuit.

Respectfully submitted,

DAVID BERMAN
100 George P. Hassett Dr.
Medford, MA 02155-329
Attorney for Petitioners

STATUTORY ADDENDUM

20 U . S . C . §1400

(a) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 412(2) (B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children. and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U .S. C. §1415(b)-(d)

(b) Required procedures; hearing

(I) The procedures required by this section shall include, but shall not be limited to—

(**A**) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
(**B**) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;
(**C**) written prior notice to the parents or guardian of the child whenever such agency or unit—

(I) proposes to initiate or change, or

(II) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (I)of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to

subsections (b) and (c) of this section shall be accorded--

(I) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,

(2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of: such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

20 U.S.C. §1415(e)(2)

(2) Any party aggrieved by the findings and decision made under - subsection (b) of this section who does not have the right to an . appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

28 U.S.C. §1254(1)

Courts of appeals; Certiorarl; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(l) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Massachusetts (General Laws c . 30A, §14(1)

§ 14. Judicial review

Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows:

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action, as follows:

(l) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as provided in section thirty-two of chapter six, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law there on, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact. whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

RULES OF THE UNITED STATES SUPREME COURT

Rule 10. Considerations Governing Review on Writ of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has

rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

BUREAU OF SPECIAL EDUCATION APPEALS

MATTHEW M.
APPELLANT

BSEA # 87-0073

V.

CONCORD PUBLIC SCHOOLS
APPELLEE

June 29, 1987

BEFORE

CAROL E. KERVICK, HEARING OFFICER

LAWRENCE KOTIN, ATTORNEY FOR APPELLANT

RICHARD SULLIVAN, ATTORNEY FOR APPELLEE

IN RE: MATTHEW M. BSEA # 87-0073

DECISION

This decision is written pursuant to M.G.L. Chs. 30A, 71B, PL 94-142, and the rules and regulations promulgated thereunder.

A hearing was conducted on February 9, 10, March 12, 13, 19, and 23, 1987 in the offices of the Massachusetts Department of Education, Quincy, MA before Carol E. Kervick, hearing officer. The following persons were in attendance for at least one day of the hearing.

Mr. Roland M.	Parent
Mrs. Miriam M.	Parent
Dianne Bossie	Court Stenographer
Marcel Kinsbourne	Pediatric Neurologist
Miriam Freedman	BSEA Observer
Denise Sarault	Stenographer
Bruce Cushna, Ph.D.	Psychologist
Lawrence Kotin	Attorney for Parent
Susan Carlson	Director, Student Support Services, Concord Public Schools
Earl Corey	Teacher, Concord Public Schools
Denise Greene	Concord Special Education Teacher
Steve Kaplan	Assit.Ditector Student Services, Concord
Anne F. Penn	Stenographer
Karl Pulkkinen	Landmark School
Kirk Swanson	Landmark School
Deborah Blanchard	Landmark School
Marie Martino	Landmark School
Richard Sullivan	Attorney for Concord
Doug Salvesen	Observer,

Margaret Chow-Menzer	Boston University Department of Social Services
Nancy Swiniarski	Court Reporter
Carol E. Kervick	Hearing Officer, BSEA

The issues to be decided are I) whether or not Concord Public Schools has proposed an IEP for Matthew M that provides for his educational development to the maximum extent feasible in the least restrictive environment; 2) whether the residential placement proposed by the parents at the Landmark School provides for Matthew's development to the maximum extent feasible in the least restrictive environment.

PROFILE

Matthew is a twelve year old boy with an attention deficit disorder and a variety of learning disabilities that affect his ability to acquire language skills in the area of reading, spelling, writing, and math. he exhibits deficits in visual motor, visual tracking and fine and gross motor coordination skills. Matthew has exhibited behavior problems of an obsessive nature including talking to himself, ripping his clothes, flapping his hands and speaking in a loud voice. Since he began school he has had difficulty relating to and being accepted by his peers.

ANALYSIS AND CONCLUSION

It is undisputed by the parties and confirmed by the evidence that Matthew is a child with special needs and thus is entitled to the rights and services required by federal and state special education laws.

I find that Concord's plan is appropriate with the addition of an offer of socialization activities after school on a regular basis to allow Matthew to achieve success and to assist him to develop socialization skills in an integrated setting with normal and handicapped peers. While Concord made an effort to include a socialization component in its 1986-1987 IEP, I find that this alone was not enough to address peer

relationship issues which clearly emerge as Matthew's predominant need at this time. I do not minimize the importance of Matthew's specific learning disabilities which affect his ability to acquire language skills in the areas of reading, spelling, writing and math. Similarly, the attention deficit disorder and deficits in fine and gross motor skills add to Matthew's complex profile. However, it is my finding that the Concord IEP's for 1984-1985 and 1985-1986 clearly identified those needs, included appropriate goals and objectives, and provided services that resulted in progress described by Dr. Cushna as most astonishing. (Exh P-73 at 2) This progress was achieved in a program that had mainstreamed Matthew in social studies and science for those two years, a mainstreaming component that did not simply immerse Matthew into a regular education program without support but allowed for integration of a group of special needs students with both regular and special needs teachers to assist them. The 1986-1987 IEP does not differ substantially from the previous 2 IEP's except that it is in a middle school with different service providers. In 1984-1985 and 1985-1986 Matthew was mainstreamed for academics for one period four days a week. In 1986-1987 he would have been mainstreamed for 6 periods a week for academics (science and social studies). The other periods of mainstreaming were for specials. Since mainstreaming was so successful for Matthew for the previous two years I do not find an additional 2 periods a week, for the same academics as he participated in before, to be a defect in the plan. The law requires that children be transitioned back into the mainstream gradually when they demonstrate readiness and it is clear to me that Concord's professional judgement based on experience with Matthew was a sound one. It also provided Matthew with the necessary content-appropriate stimulation that he clearly needed and thrived on.

For all three IEP's the student teacher ratio was appropriate and was consistent with the recommendations of experts including Dr. Cushna and Dr. Kinsbourne. As to the transitions that would be required of Matthew for 19861987 I find them to be less frequent and to involve fewer professional service providers than at Landmark.

Other services found to be necessary for Matthew by evaluators and Concord are lacking in the Landmark program. While Matthew clearly benefits from occupational therapy to enhance the development of motor skills, none is provided at Landmark. While Concord addresses the socialization issues, albeit not sufficiently in my judgment, Landmark seems to take the position that with mere exposure to other children socialization will occur spontaneously. When observed by Concord staff at Landmark Matthew continued to isolate himself and Landmark staff made no effort to draw him in. I agree with parents' witness Dr. Cushna that Matthew needs some form of group therapy to deal with socialization and to help him to be "held together." Yet none of this is offered to Matt at Landmark, a school that primarily deals with educational deficits related to learning disabilities. I do not see Landmark as providing a therapeutic milieu for a child whose major presenting problem at this time is socialization skills.

Turning next to the issue of personnel, while Concord staff is appropriately certified and has advanced degrees, key staff at Landmark is uncertified. Denise Greene may not have years of experience but I was impressed by her skills and sensitivity (Several of the Landmark staff also have little experience and less training). While the parents in their closing argument take great pains to compare Mr. Coreys class to Denise Greene's, they do not measure the Landmark program by the same criteria. In other words, if a small self contained class with the same teacher and the same peers, by specific recommendation and inference, was appropriate for Matthew, that type of program is clearly not available at Landmark. In fact more service providers are involved with Matthew at Landmark than in either the Corey or the Greene program.

Based on the evidence, I find that Concord's IEP also has a superior approach/methodology where Landmark's focus on decoding skills could result in a regressive situation for Matthew.

I therefore find that the Concord 502.4 placement is superior to the Landmark 502.5 program in credentials and experience of staff, methodology, extent and type of

services, and opportunity for mainstreaming, that would allow for peer interaction with students in Ms. Greene's class. Greene's students are more like Matthew in terms of needs and levels of achievement than the students at Landmark. Concord also provides for interactions with normal peers through the mainstreaming component. At Landmark Matthew is the only student who presents with behavioral needs requiring a social tutorial.

Turning next to the issue of residential placement it is my opinion that any reliance on the David D. case as setting forth standards to be applied in all cases where residential placement is at issue is to read the case too broadly. David D. presented as a mentally retarded person whose educational issues were issues dealt with control of behavior needed to generalize in order to enable him to function in society and behave appropriately in work and social situations. David D.'s behaviors were of a sexual and aggressive nature and needed to be extinguished or controlled to allow him to participate in a group home and sheltered workshop. The expertise required to accomplish those goals could not be considered "ordinary parenting skills."

Contrast the needs of Matthew M. While his loud speech, occasional talking to himself, lack of interest in dressing, and poor eating habits may be annoying to his parents and others, they are only minimally interfering with his day to day life and apparently not at all with his ability to benefit from education. Matthew, unlike David D. is functioning well in society. Further Matthew has intellectual skills of at least an average level. And from the testimony of Kirk Swanson who is not a behavioral management expert we learned that the only service Matthew received in the residential component consisted of common sense techniques to ensure task completion. According to Swanson what Matthew needed was attention to organizational issues and no special qualifications were required to provide Matthew with some structure.

Although I disagree with Dr. Kinsbourne's conclusion on the need for residential placement, I do agree that Matthew needs constant intervention. In his report (P-75, at 3) he recommends:

> "The need of a student like this can be addressed by individualized tutoring but cannot be met solely by the provision of specific educational experiences. Social ineptitude puts him at risk of unpleasant life experiences that could drive him into major depression. He has a clear need for a generally responsive and supportive milieu. Matthew's social handicaps will not correct themselves nor would they readily be corrected although the attempt should continue to be made. It is necessary for staff to be constantly at hand to intervene when Matthew gets himself into difficult situations."

I am troubled by the fact that Landmark staff were not aggressively working to integrate Matthew in either the afternoon or residential components. The fact that Matthew now has a friend acceptable to his parents is certainly a positive gain for Matthew. I fail to find, however, that anything particular to the Landmark program contributed to this development. Perhaps, as with Aron, it was simply spending a lot of time in close proximity.

I therefore find that Matthew's needs are not so severe as to dictate a residential placement and even if they were or become so in the future, that Landmark is not an appropriate service provider.

Parents raised issues of procedural violations regarding the development, writing and completion of the final IEP. The facts are not clear and the issues are confusing However I feel I need not reach those procedural issues in order to render a decision equitable to the parents and Concord. It was clear to the Concord staff that Mrs. M. in particular relied heavily on Mr. Coreys' advice during Matthew's 2 years in his class. That she would rely on any of his recommendations, including his support for Landmark in July 1986, should come as no surprise to anyone. Even though Mr. Corey's recommendations for Landmark cannot be considered an official act or commitment, the parents relied <u>at least</u> on his perception of the Landmark program as an appropriate placement for Matthew. Corey, after visiting the program, changed his mind as to its

appropriateness and I concur with his judgment.

It was also clear to the Concord staff that Mr. and Mrs. M. were concerned that the 1986-1987 IEP be virtually identical to the 1985-1986 Corey program. Corey, Kaplan and Greene assured the parents that Greene's program was virtually identical. I have found that, although not identical, it was a superior program to Landmark. Because of the parents' confusion and reliance on statements of Concord staff as well as Drs. Kinsbourne and Cushna, they placed Matthew at Landmark. That seven months later Concord has convinced this hearing officer that the 502.5 or 502.6 Landmark programs are inappropriate and the 502.4 Concord program is appropriate is irrelevant to the issue of the right to reimbursement for a past unilateral action. The parents reasonably relied on Mr. Corey's summer 1986 opinion when they placed Matthew in September, 1986. Concord's IEP was not complete until January, 1987 when the final IEP was received by the parents. It should also be noted that the aide was not hired until January. These conditions were confusing and prevented the parents from making a decision based on the totality of Concord's proposed plan.

I find that due to the confusion over the Concord 1986-1987 plan, coupled with parents' reliance on Corey's opinion (even if it was offered only to get Matthew out of the home), Mr. and Mrs. M. are entitled to be reimbursed for the Landmark day component including the after school activities, from September through January 1987. This placement however shall not be considered the last agreed upon placement for the purposes of placement pending appeal as I have found the Concord program, with an additional after school peer interaction program, to be a superior one to Landmark and the Landmark program to be inappropriate. Concord shall reconvene the TEAM to write an IEP including after school services to provide Matthew with meaningful opportunities for peer relationships. I will leave it to the TEAM to determine the nature and extent of such services.

RECONSIDERATION OF DECISION:

Reconsideration of the case may be granted upon the showing of any serious error of law; misconstruction of the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals, such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEAL:

Both parties have rights of appeal under P.L. 94-142 (20 U.S.C. 1401), Chapter 71B and 30A of the Massachusetts General Laws. The parents may choose to appeal the Decision of the Bureau to the State Advisory Commission (SAC) by indicating such desire on the Choice of Options form which accompanies this Decision, and submitting it along with a written statement to the SAC of their objections to the Bureau decision, including arguments in support of their objections, and the evidence in the record which supports their arguments, within the timelines specified.

Within five days of receipt of the parent's statement, copies will be provided by the SAC to the other parties in the case, who shall then have 10 days in which to respond to the parents' statement in writing to the SAC. The SAC shall consider the appeal at its next monthly meeting provided that it receives the appeal (including all party statements) at least 15 days before such meeting. The parent appeal to the State Advisory Commission is optional.

The State Advisory Commission has limited review authority in that it will not hear new evidence in any form. It will review the Decision of the BSEA to determine if it is reasonable based on the evidence in the record, and is consistent with established policy and law. The SAC must determine whether the parties had, generally, notice of the proceedings and an opportunity to be heard, and whether

the procedural guarantees found in M.G.L. c. 71B (Chapter 766), c. 30A (State Administrative Procedures Act) and P.L. 94-142 and their attendant regulations have been observed, and whether any procedural violations were material or harmful.

The public school and the parent, when the parent waives the right to appeal to the State Advisory Commission, or following the decision of the SAC, may file a petition for review in the Superior Court of competent jurisdiction or in the District Court of the United States. Appeals to Superior Court must be filed within 30 days after receipt of the Final Decision of the Bureau of Special Education Appeals or the State Advisory Commission, the Decision is final and then must be implemented immediately unless the case is appealed to court. While a court appeal is pending, the public school is responsible for maintaining the child in the program last agreed upon by the school and the parents unless the party seeking a change of that placement attains a preliminary injunction in court ordering the change. Regardless of which party pays for a child's private school placement while a court appeal is pending, ultimate fiscal responsibility may rest with the party that loses in court (Burlington S.C. v. DOE, 105 S.Ct. 1996 (1985)).

RECORD OF THE HEARING

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request. M.C.L. c. 30A §11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A §11(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

> 30A §14(4) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education Appeals for certification within 35 days of service of a copy of a petition for review upon the agency. Any party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child (i.e., use only child's first name or John or Jane Doe) and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

Carol E. Kervick
HEARING OFFICER

BUREAU OF SPECIAL EDUCATION APPEALS

MATTHEW M.

APPELLANT
BSEA # 87-0073

V.

CONCORD PUBLIC SCHOOLS
APPELLEE

June 29, 1987

BEFORE

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RICHARD SULLIVAN, ATTORNEY FOR APPELLEE

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PROFILE

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ANALYSIS AND CONCLUSION

It is undisputed by the parties and confirmed by the evidence that Matthew is a child with special needs and thus is entitled to the rights and services required by federal and state special education laws.

I find that Concord's plan is appropriate with the addition of an offer of socialization activities after school on a regular basis to allow Matthew to achieve success and to assist him to develop socialization skills in an integrated setting with normal and handicapped peers. While Concord made an effort to include a socialization component in its 1986-1987 IEP, I find that this alone was not enough to address peer

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For all three IEP's the student teacher ratio was appropriate and was consistent with the recommendations of experts including Dr. Cushna and Dr. Kinsbourne. As to the transitions that would be required of Matthew for 19861987 I find them to be less frequent and to involve fewer professional service providers than at Landmark.

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Turning next to the issue of personnel, while Concord staff is appropriately certified and has advanced degrees, key staff at Landmark is uncertified. Denise Greene may not have years of experience but I was impressed by her skills and sensitivity (Several of the Landmark staff also have little experience and less training). While the parents in their closing argument take great pains to compare Mr. Coreys class to Denise Greene's, they do not measure the Landmark program by the same criteria. In other words, if a small self contained class with the same teacher and the same peers, by specific recommendation and inference, was appropriate for Matthew, that type of program is clearly not available at Landmark. In fact more service providers are involved with Matthew at Landmark than in either the Corey or the Greene program.

Based on the evidence, I find that Concord's IEP also has a superior approach/methodology where Landmark's focus on decoding skills could result in a regressive situation for Matthew.

I therefore find that the Concord 502.4 placement is superior to the Landmark 502.5 program in credentials and experience of staff, methodology, extent and type of

services, and opportunity for mainstreaming, that would allow for peer interaction with students in Ms. Greene's class. Greene's students are more like Matthew in terms of needs and levels of achievement than the students at Landmark. Concord also provides for interactions with normal peers through the mainstreaming component. At Landmark Matthew is the only student who presents with behavioral needs requiring a social tutorial.

Turning next to the issue of residential placement it is my opinion that any reliance on the David D. case as setting forth standards to be applied in all cases where residential placement is at issue is to read the case too broadly. David D. presented as a mentally retarded person whose educational issues were issues dealt with control of behavior needed to generalize in order to enable him to function in society and behave appropriately in work and social situations. David D.'s behaviors were of a sexual and aggressive nature and needed to be extinguished or controlled to allow him to participate in a group home and sheltered workshop. The expertise required to accomplish those goals could not be considered "ordinary parenting skills."

Contrast the needs of Matthew M. While his loud speech, occasional talking to himself, lack of interest in dressing, and poor eating habits may be annoying to his parents and others, they are only minimally interfering with his day to day life and apparently not at all with his ability to benefit from education. Matthew, unlike David D. is functioning well in society. Further Matthew has intellectual skills of at least an average level. And from the testimony of Kirk Swanson who is not a behavioral management expert we learned that the only service Matthew received in the residential component consisted of common sense techniques to ensure task completion. According to Swanson what Matthew needed was attention to organizational issues and no special qualifications were required to provide Matthew with some structure.

Although I disagree with Dr. Kinsbourne's conclusion on the need for residential placement, I do agree that Matthew needs constant intervention. In his report (P-75, at 3) he recommends:

> "The need of a student like this can be addressed by individualized tutoring but cannot be met solely by the provision of specific educational experiences. Social ineptitude puts him at risk of unpleasant life experiences that could drive him into major depression. He has a clear need for a generally responsive and supportive milieu. Matthew's social handicaps will not correct themselves nor would they readily be corrected although the attempt should continue to be made. It is necessary for staff to be constantly at hand to intervene when Matthew gets himself into difficult situations."

I am troubled by the fact that Landmark staff were not aggressively working to integrate Matthew in either the afternoon or residential components. The fact that Matthew now has a friend acceptable to his parents is certainly a positive gain for Matthew. I fail to find, however, that anything particular to the Landmark program contributed to this development. Perhaps, as with Aron, it was simply spending a lot of time in close proximity.

I therefore find that Matthew's needs are not so severe as to dictate a residential placement and even if they were or become so in the future, that Landmark is not an appropriate service provider.

Parents raised issues of procedural violations regarding the development, writing and completion of the final IEP.The facts are not clear and the issues are confusing However I feel I need not reach those procedural issues in order to render a decision equitable to the parents and Concord. It was clear to the Concord staff that Mrs. M. in particular relied heavily on Mr. Coreys' advice during Matthew's 2 years in his class. That she would rely on any of his recommendations, including his support for Landmark in July 1986, should come as no surprise to anyone. Even though Mr. Corey's recommendations for Landmark cannot be considered an official act or commitment, the parents relied <u>at least</u> on his perception of the Landmark program as an appropriate placement for Matthew. Corey, after visiting the program, changed his mind as to its

appropriateness and I concur with his judgment.

It was also clear to the Concord staff that Mr. and Mrs. M. were concerned that the 1986-1987 IEP be virtually identical to the 1985-1986 Corey program. Corey, Kaplan and Greene assured the parents that Greene's program was virtually identical. I have found that, although not identical, it was a superior program to Landmark. Because of the parents' confusion and relicance on statements of Concord staff as well as Drs. Kinsbourne and Cushna, they placed Matthew at Landmark. That seven months later Concord has convinced this hearing officer that the 502.5 or 502.6 Landmark programs are inappropriate and the 502.4 Concord program is appropriate is irrelevant to the issue of the right to reimbursement for a past unilateral action. The parents reasonably relied on Mr. Corey's summer 1986 opinion when they placed Matthew in September, 1986. Concord's IEP was not complete until January, 1987 when the final IEP was received by the parents. It should also be noted that the aide was not hired until January. These conditions were confusing and prevented the parents from making a decision based on the totality of Concord's proposed plan.

I find that due to the confusion over the Concord 1986-1987 plan, coupled with parents' reliance on Corey's opinion (even if it was offered only to get Matthew out of the home), Mr. and Mrs. M. are entitled to be reimbursed for the Landmark day component including the after school activities, from September through January 1987. This placement however shall not be considered the last agreed upon placement for the purposes of placement pending appeal as I have found the Concord program, with an additional after school peer interaction program, to be a superior one to Landmark and the Landmark program to be inappropriate. Concord shall reconvene the TEAM to write an IEP including after school services to provide Matthew with meaningful opportunities for peer relationships. I will leave it to the TEAM to determine the nature and extent of such services.

RECONSIDERATION OF DECISION:

Reconsideration of the case may be granted upon the showing of any serious error of law; misconstruction of the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals, such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEAL:

Both parties have rights of appeal under P.L. 94-142 (20 U.S.C. 1401), Chapter 71B and 30A of the Massachusetts General Laws. The parents may choose to appeal the Decision of the Bureau to the State Advisory Commission (SAC) by indicating such desire on the Choice of Options form which accompanies this Decision, and submitting it along with a written statement to the SAC of their objections to the Bureau decision, including arguments in support of their objections, and the evidence in the record which supports their arguments, within the timelines specified.

Within five days of receipt of the parent's statement, copies will be provided by the SAC to the other parties in the case, who shall then have 10 days in which to respond to the parents' statement in writing to the SAC. The SAC shall consider the appeal at its next monthly meeting provided that it receives the appeal (including all party statements) at least 15 days before such meeting. The parent appeal to the State Advisory Commission is optional.

The State Advisory Commission has limited review authority in that it will not hear new evidence in any form. It will review the Decision of the BSEA to determine if it is reasonable based on the evidence in the record, and is consistent with established policy and law. The SAC must determine whether the parties had, generally, notice of the proceedings and an opportunity to be heard, and whether

the procedural guarantees found in M.G.L. c. 71B (Chapter 766), c. 30A (State Administrative Procedures Act) and P.L. 94-142 and their attendant regulations have been observed, and whether any procedural violations were material or harmful.

The public school and the parent, when the parent waives the right to appeal to the State Advisory Commission, or following the decision of the SAC, may file a petition for review in the Superior Court of competent jurisdiction or in the District Court of the United States. Appeals to Superior Court must be filed within 30 days after receipt of the Final Decision of the Bureau of Special Education Appeals or the State Advisory Commission, the Decision is final and then must be implemented immediately unless the case is appealed to court. While a court appeal is pending, the public school is responsible for maintaining the child in the program last agreed upon by the school and the parents unless the party seeking a change of that placement attains a preliminary injunction in court ordering the change. Regardless of which party pays for a child's private school placement while a court appeal is pending, ultimate fiscal responsibility may rest with the party that loses in court (Burlington S.C. v. DOE, 105 S.Ct. 1996 (1985)).

RECORD OF THE HEARING

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request. M.C.L. c. 30A §11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A §11(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

> 30A §14(4) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education Appeals for certification within 35 days of service of a copy of a petition for review upon the agency. Any party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child (i.e., use only child's first name or John or Jane Doe) and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

Carol E. Kervick
HEARING OFFICER

JULY27, 1987

COMMONWEALTH OF MASACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: MATTHEW M.
V. BSEA # 87-0073
CONCORD PUBLIC SCHOOLS

DECISION ON MOTIONS OF PARENTS AND CONCORD FOR RECONSIDERATION AND CLARIFICATION

I conclude that at the time of the parents decision to place Matthew at Landmark the Concord 502.4 IEP was not in compliance procedurally because it was not presented to the parents in writing with specificity as to the services prior to the beginning of the 1986-1987 school year. In fact there was no complete procedurally appropriate IEP until some time in December or January. Further the IEP was deficient substantively in that it did not provide sufficient socialization experiences after school for Matthew. And finally, the aide required to guarantee sufficient small group, individual instruction and monitoring was not available until January. One month before the time of the parents decision Mr. Corey, Matthew's teacher for two years in Concord, indicated that the program at Landmark was an appropriate one. Landmark also provided socialization, experiences and an extended school day. It should also be noted that no staff at Concord indicated to the parents that the academic components at the Landmark program were not appropriate.

My order to Concord to reimburse the parents for the day component - i.e. the 502.5 placement including after school services is based on the procedural and substantive inadequacies of the Concord IEP, that existed until January 1987, and the parents reasonable reliance on Mr. Corey's approval. Given the inadequacies of the Concord program

the parents chose to place Matthew in Landmark following a successful summer placement there. The Landmark program appeared to them to be an appropriate alternative program that did include considerably more opportunities for socialization. At the time of their decision, given all of the facts, they acted reasonably and therefore they are entitled to reimbursement until that point in time - January - when Concord presented and was capable of implementing an IEP that was more appropriate in most respects than that of Landmark.

As to the placement pending appeal issue, however, once Concord presented an IEP that was procedurally in compliance and substantively superior, the Landmark program must be view with greater scrutiny. Particularly in this case where the defects found in Concord original program were minor and where those later found in Landmark's program were substantial, it would be irresponsible to continue to hold Concord responsible for maintaining a child in much more restrictive program at a significant distance from his home and community. Matthew had achieved significant gains from a more mainstreamed placement in the past and would likely continue to do so. In this case to my mind the requirement of least restrictive environment outweighs the "stay put" provisions, particularly where the less restrictive program is more appropriate. Therefore the Landmark program is not the placement pending appeal.

As to the amount of reimbursement the parents or Landmark may apply to the Division of Special Education for a determination of the costs, if any, for the 502.5 extended day placement.

7/24/87

Carol E. Kervick, Hearing Officer
Bureau of Special Education Appeals

AUG16 1988
AUG 24 1988

BUREAU OF SPECIAL EDUCATION APPEALS

MATTHEW M.

APPELLANT

BSEA #88-0086

V.

CONCORD PUBLIC SCHOOLS

APPELLEE

BEFORE
PHYLLIS RYACK, HEARING OFFICER
DAVID BERMAN, ATTORNEY FOR APPELLANT
RICHARD SULLIVAN, ATTORNEY FOR APPELLEE

MASSACHUSETTS DEPARTMENT OF EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: MATTHEW M. BSEA CASE #88-0086

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A, and 71B; 20 U.S.C. 1401-1461; and the regulations promulgated thereunder.

A hearing was held by the Bureau of Special Education Appeals (BSEA) on 2/24/88, and 3/8/88 & 3/10/88 at the Northeast Regional Education Center, North Reading, and on 3/28/88 , 4/6/88, 4/29/88 and 5/25/88 *at the Concord Public Schools (Concord) on appeals by Mr. and Mrs R.M. of the 1987-1988 Individual Educational Plan (IEP) proposed by Concord for their minor son, Matthew.

Persons present at all, or part of, the hearing were:

Mr. and Mrs. R.M.	-Parents
David Berman	-Counsel for Child/Parents
Richard Sullivan	-Attorney for the Concord School Committee
Susan Carlson	-Director of Student Support Services,- Concord
Denise Greene	-Special Education Teacher, Concord Middle School
Dr. Barbara Miller	-School Psychologist, Concord
Lisa Kendrick	-Teacher, Landmark School
Deborah Blanchard	-Student's Case Manager, Landmark
Wendy Atwood	-Teacher, Landmark
Karl Pulkkinen	-Public School Liaison, Landmark
Archibald Campbell	-Director of Guidance and Campus Affairs, Landmark
Dr. Michael Marcus	-Psychiatrist
Kathleen Bradley	-Court Stenographer
Elaine Duguay	-Court Stenographer
Shelly Killian	-Court Stenographer

Laurie Lampron	-Court Stenographer
Kathleen Emmel	-Court Stenographer
Linda Allan	-Court Stenographer
Isabelle Klebanow	-Court Stenographer
Phyllis Ryack	-BSEA, Hearing Officer

*Closing arguments were received from the Parents and Concord on 7/21/88.

PROFILE

Matt is a 13 year old student who presents a constellation of special needs that compromise his ability to learn, and can be categorized in three distinct areas: 1. Visual perceptual motor problems that affect fine and gross motor skills, spatial motor planning, unawareness of extraneous motor movement, and an expressive language disorder that is manifested in problems with intonation, sequencing and organizing thoughts, and modulating voice volume; 2. Attention deficit disorder evidenced by short attention span, inconsistency with auditory retention, and perseverating/fixating on isolated ideas or issues; and 3. Social/emotional factors that impact on rudimentary social skills, poor self-image and diminished confidence, high anxiety in dealing with academic demands, and rigidity in thinking. (Testimony of Carlson, Mr. M., Exhs. S-11-88, S-15-88)

Matt attended a 502.4 program within the Concord Public Schools from 9/84 to 6/86. His parents placed him in a 502.6 residential setting at the Landmark School in 9/86 where he remained to the date of the instant hearing.

PROCEDURAL DISCUSSION

I. BSEA issued a decision on 6/11/87 dealing with the 1986-1987 IEP (Exh. S-14-88). This decision is currently under appeal in Federal District Court, and will likely be consolidated with this instant decision. The exhibits entered into the record during the prior hearing were incorporated

by reference into the instant record-Exhs. S-1-87 to S-16-87 and P-1-87 to P-83-87.

II. It is undisputed that the following procedural events occurred: (Exhs. S-3, 4,11,12,15-88)

1. The TEAM convened on 5/26/87 to develop an IEP for the 1987-1988 school year based on performance levels reported by the Landmark School (Landmark) for the period between 1/87 and 5/87.

2. Matt's parents rejected Concord's proposed IEP on 7/1 0/87 .

3. The TEAM reconvened on 7/29/87 to develop an amendment to the IEP incorporating an after-school component.

4 . Mr . and Mrs . M. rejected the amended IEP on 8/28/87 .

5. Since Concord was obligated to conduct a 3-year reevaluation in 6/87, pursuant to Regulation 334, the parties agreed to delay these assessments pending receipt of reports from Dr. Bruce Cushna and Dr. Marshall Kinsbourne (current treating physicians), and 1986-1987 year-end assessments from Landmark.

6. The apparent shared assumption by the parties was that all assessments and evaluations referenced in #5. supra would be made available during summer 1987, and that the TEAM would reconvene in September or October 1987 to consider all updated information.

7. Concord received the Landmark assessments in 11/87, and Dr. Cushna's report in 12/87.

8. On 1/29/88 and 2/3/88, Concord mailed to the parents a Parental Permission form that described the assessments required for the 3-year reevaluation. Apparently the parents did not receive the first mailing, and a second mailing was necessary.

9. Mr. M. gave his consent to allow Concord to conduct the 3-year reevaluation on 2/24/88 - the first day of hearing. The reevaluation was not conducted.

ISSUES

1. Does Concord's proposed 1987-1988 IEP address

Matthew's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment consistent with state and federal statutory requirements?

2. If a negative finding is attached to the above, is the Landmark School's 502.6 educational program required to achieve maximum feasible educational benefits in the least restrictive educational setting?

POSITIONS OF THE PARTIES

Parents - They contended that maintaining the 502.6 residential placement at Landmark was critical to enable Matt to achieve maximum feasible educational benefits for the following reasons: 1. Demonstrated gains in specific academic skill areas, 2. Improved socialization skills in school and at home, 3. Increased confidence and self-esteem, and 4. These gains were considered to be tenuous and fragile, and likely to be compromised if he were to return to Concord.

Concord - The 502.4 plan included the following components: Daily small group instruction in reading, English, math, in-class support, and academic tutorials; weekly small group counseling by the school psychologist to focus on socialization skills; weekly individual sessions in occupational therapy and speech/language therapy; and an after-school activity program to promote positive peer relations and effective social skills. Concord argued that this plan combined intense remediation with mainstreaming opportunities, and was far superior to Matt's current placement at Landmark.

REVIEW OF EVIDENCE

1. Testimony by Archibald Campbell, Director of Guidance/Campus Affairs, and Exh. P-4, indicated that of the five teachers at Landmark delivering direct academic services to Matt during 1987-88, only Kathleen Daily,

language arts tutor, holds moderate special needs certification. The remaining four teachers hold neither regular education nor moderate special needs certifications within the Commonwealth. Deborah Blanchard, his case manager, does hold moderate special needs certification.

2. On 1/20/87, The Department of Education (DOE) granted to Landmark a second provisional approval for six months, effective 1/1/87, to allow the Headmaster to complete the enrollment of staff into programs leading to certification. This provisional approval was granted in accordance with 603 CMR Section 18.00 (1)

(a), 2. Regulations for the Approval of Private Special Education Schools to Serve Publicly Funded Students. (Exh. S-21-88)

Mr. Campbell requested on 7/24/87 that DOE extended the provisional approval pending a full program audit by DOE scheduled for 10/87. To date, DOE has taken no further action in this matter.

3. Mr. Campbell cited the following statistics dealing with the North Campus where Matt is presently enrolled: 10 of the 47 teachers did not return for the 1987-1988 school year: 16 or 17 of the current 47 teachers hold moderate special needs certification; 10-15 of the remaining 30 teachers are now enrolled in either programs at Salem State College leading to regular education certification, or at Lesley College leading to moderate special needs certification having completed regular education prerequisites.

Mr. Campbell testified that despite his frequent prompting urging teachers to enroll in certification granting programs, many remain unenrolled, and without any punitive action taken by Landmark.

4. Wendy Atwood (B.S. in Art/Education/Psychology, and certified in art in New York for K-12) is Matt's teacher in Pragmatics-Oral Expression. She holds no certifications in either regular education or moderate special needs within the Commonwealth. Ms. Atwood testified that: 1. She could

not identify nor discuss Matt's specific learning disabilities as they affect his ability to learn and achieve academic progress; 2. The program provided at the North Campus is not intensively language-based; 3. To the date of her testimony on 2/24/88, all of Matt's teachers had not met during the current school year to discuss his progress specifically, but that minimal informal contact among teachers usually takes place; 4. Although she is responsible for the daily lesson plan, she has not tailored the instructional materials nor approach to address Matt's individual needs; 5. To encourage Matt to self-monitor his normally loud, monotone voice in class, Ms. Atwood provides gestures and cues, and uses a tape recorder; 6. At the start of the school year, Matt frequently bit his arm, and shook papers noisily causing distraction to the other 7 students. Ms. Atwood stated that the arm biting ceased during the fall, most likely the result of peer criticism.

Ms. Atwood's progress report, dated 11/6/87 (Exh. 5-7-88, page 44), indicated that Matt participated in class activities willingly; he required "encouragement to refrain from inappropriate behavior (engaging in conversation during presentation, biting his hands, tapping his pencil)", and homework was consistently completed on time.

5. Lisa Kendrick (B.A. in Religion and minor in English) holds no teaching certifications, and has been a faculty member at Landmark since 9/85. Ms. Kendrick is Matt's language arts teacher, and also a team leader for the residential program. She testified that she is not enrolled in any certification granting program, and was notified once during the current school year by the Landmark administration concerning enrollment at Salem State College. Ms. Kendrick initiated the following contacts with other teachers to assist her in providing services to Matt: 1. She discussed Matt's specific needs twice with Susan Richardson, Matt's language arts teacher during 1986-1987; and 2. Although she was uncertain whether Matt is currently receiving speech/language therapy, Ms. Kendrick consulted with the speech/language therapist to assist Matt in modulating his voice volume. Further, she testified that she met with Adrian Jellinghaus, her supervisor, for the first

time on 3/1/88 to discuss Matt's specific learning deficits.

In response to a query to determine Ms. Kendrick's understanding of the term "language-based", she responded that - she could not "give a good definition... I wouldn't know a (good approach for language-based instruction for Matthew M.)". Ms. Kendrick further acknowledged that she was unaware of the language methodology used by Matt's other teachers.

As residence team leader since 6/87 for Matt's dormitory every Wednesday evening from 3 P.M. to about 10:30 P.M. to midnight, and one weekend monthly, Ms. Kendrick stated that she has never observed any inappropriate behavior by Matt, nor has she ever implemented any specific behavior management strategies for him. She cited the following improvements in Matt's dormitory behavior during 1987-1988: 1. Maintains eye contact; 2. More willing to reach compromises with his roommate; 3. Shares common interests with the other boys; and 4. Freely compliments achievements of other boys.

Based on her day-to-day observation of Matt's progress, Ms. Kendrick testified that Matt achieved the following gains in language arts since the start of the school year; Increased accuracy in noun and verb usage, employs more adjectives in expressive writing, improved ability in outlining reading material accurately, demonstrates more creativity and enthusiasm in writing assignments, ability to proof-read more accurately, written homework assignments have become longer independently, and improved self-confidence.

6. Karl Pulkkinen, Public School Liaison at Landmark School, discussed Matt's progress in the North Campus program (based essentially on conversations with supervisors in subject areas), and his reactions to the IEP proposed by Concord for 1987-1988. Following is a comparison of grade equivalency scores achieved by Matt on standardized protocols on 6/87 - end of 1986-87 school year, and 9/87 and 10/87 - start of 1987-88 school year: (Exh. P-6-88) (Note: those grades that are separated by a slash indicate that the first grade was earned on a timed testing period, and the second grade denotes an untimed

testing period.)

	6/87 6th gr	9/87 7th gr	10/87 7th gr
Gray Oral Reading	5.9		4.4/4.5
Slosson Oral Reading	7.4		7.2
Stanford Spelling	5.3	5.1	

Stanford Achievement Tests

	Level I-1 Form F	Level 1-2, Form E
Reading Comprehension	2.8/7.0	4.3/7.5
Word Skills	2.5/2.8	4.9/6.8
Mathematics	1.8/4.7	4.2 -Level 1-1

Mr. Pulkinnen reviewed examples of Matt's unacceptable behavior at bedtime that resulted in suspension by the Disciplinary Committee for four days starting 6/1/87 (Exhs. P-7, P-8-88). When he returned to school, he was placed on social probation that involved restrictions on dress, free time, and off-campus activities.

Mr. Pulkinnen's main objection to the proposed Concord IEP was his perception that the goals and objectives were overly ambitious for Matt's attainment. He testified that the objectives were "too far-reaching and unrealistic to expect.

7. Deborah Blanchard (M. Ed., Lesley College and holding certifications in moderate special needs - N to 9, supervisor/director - K to 8, and elementary - K-8) serves on the North Campus at Landmark as Educational Coordinator, Supervisor, and Case Manager for 9 students, including Matt. Ms. Blanchard described the following components of in-service training made available to Landmark teachers: 1. All new teachers are required to take a one-week intensive summer program that deals with a comprehensive overview of academic and administrative responsibilities; 2. Two-hour sessions are conducted four times annually that focus on specific special education topics attention deficit disorders, appropriate student profiles for admission, diagnosis of special needs, etc; and 3. Daily half-hour "milk breaks" that deal with specific

educational issues, and occasionally involve case discussions of individual students.

Since Matt is considered by Landmark to be privately funded by his parents (pending resolution of the appeals in Federal District Court), Ms. Blanchard testified that Landmark has not developed an IEP for 1987-1988. Further, she stated that to ensure consistency in a programmatic approach for each student's individual special needs, teachers rely on a generalized Landmark philosophy. Team meetings attended by all teachers attached to a student's program are generally not held during the school year, except on an as-needed basis.

As the supervisor for Matt's daily individual language tutorial, Ms. Blanchard listed the following areas where she has discerned progress by Matt based on 7 observations during 1987-88: written expression, paragraph development, handwriting, increased fluency in reading, dramatic improvement in voice modulation, and considerable increase in eye contact. Although she acknowledged that Matt had demonstrated both fine and gross motor deficits, Ms. Blanchard testified that Landmark did not arrange for an outside occupational therapy evaluation since the school does not employ a registered occupational therapist. Ms. Blanchard further stated that the speech/language therapist who provided services during 1986-87 did not complete formal testing at the completion of the school year. Rather, the speech/language therapist's anecdotal account of Matt's deficit areas formed the basis for Matt's placement in his current oral expression/pragmatics class.

The final sentence of the Disciplinary Committee Report, dated 6/1/87 (Exh P-8-88), stated that "The Committee also recommended... a reassessment of his social needs by the Landmark psychological staff". Ms.Blanchard testified that Matt tantrummed a few times in 9/87 and 10/87 when reprimanded by the dorm counselor for continued unacceptable bedtime behavior. However, Landmark did not conduct any social or psychological assessments at the conclusion of 1986-87, or any time during 1987-88. Althouqh, Ms. Blanchard stated that Matt was included on a list of students to be screened by the adjustment counselor

during fall 1987, this screening did not take place at any time prior to Ms. Blanchard's being advised by Mrs. M. at the end of 10/87 that Matt was receiving private psychiatric treatment.

As Matt's Case Manager, Ms. Blanchard testified that Matt evidenced no problem transitioning from class to class, teacher to teacher, or from one dorm counselor to another.

8. Susan Carlson, Director of Student Support Services for the Concord Public Schools (M.S. Columbia School of Education, completion of all doctoral course work at Boston College, and holding certification in moderate special needs and Administrator of Special Education, K-12) focused her testimony on the procedural and substantive aspects of the TEAM Meetings on 5/26/87 and 7/29/87, and her perception of the parents' concerns at these meetings. Ms. Carlson had seen Matt occasionally when he attended the substantially separate 502.4 class at the Williard School during the 4th and 5th grades (9/84-6/86), and reviewed all progress reports, assessments, and independent evaluations pursuant to both the prior and instant appeal hearings.

Ms. Carlson recollected that at the TEAM meeting on 5/26/87, Karl Pulkkinen, Public School Liaison at Landmark, discussed the following aspects of a proposed educational program for Matt: science and social studies content subjects, learning disabilities, academic areas, and emotional needs. Ms. Carlson testified that all participants agreed that programming in Concord during 1987-88 for science and social studies could be flexible - both contents areas could be provided within the substantially separate 502.4 program, or science could be delivered in a regular 7th grade class (with an in-class tutor providing assistance to Matt in note-taking and organization), augmented by a daily session of small group academic support. Since Matt has evidenced good comprehension in regular education science when he attended the Williard School, Ms. Carlson testified that this contents ares in a regular 7th grade class would be a strength and a source of self-esteem for Matt.

Ms. Carlson stated that at the 5/26/87 TEAM Meeting: 1. The parents did not indicate any dissatisfaction with

Concord's proposed 1987-88 IEP; 2. Ms. M. discussed Matt's progress at Landmark; 3. Mrs. M. requested that Matt return to Landmark for the 1987-88 school year, 4. The parents did not refer to any past teasing of Matt when he attended Concord schools, 5. and. The parents did not request that Concord provide a counseling service .

Following receipt by Concord of BSEA decision of Case #870073 (Exh. S-14-88), Ms. Carlson testified that the TEAM reconvened on 7/29/87 to comply with the following language contained in this decision: "Concord shall reconvene the TEAM to write an IEP including after school services to provide Matthew with meaningful opportunities for peer relationships. I will leave it to the TEAM to determine the nature and extent of such services". At the meeting, Ms. Carlson distributed to all participants (parents, Steven Kaplan - Assistant Director of Student Support Services, and Karl Pulkkinen of Landmark) a proposed consideration for after-school programs and possibilities for implementation (Exh. 5-22). Ms. Carlson stated that Denise Greene, Matt's proposed teacher for the 502.4 program, would also conduct the after-school services. The participants reached consensus that the after-school program should be scheduled 2 or 3 afternoons weekly, rather than daily, in order to determine whether socialization gains were carried into unstructured activities with Matt's neighborhood peers. Ms. Carlson recalled that the parents preferred an integrated mix of youngsters (regular education and special needs), and lower competition activities. Ms. Carlson testified that the "parents didn't have specific concerns about the rejected IEP, they just wanted to keep Matthew at Landmark". Further, they did not raise any concerns about Matt's experiencing any teasing when he was in the Concord Schools. The parents rejected the amended 1987-88 IEP on 8/28/87.

Ms. Carlson pointed out that: 1. The IEP did not include occupational therapy (OT) goals and objectives since Matt did not receive this service at Landmark, and there was no recent evaluation. Concord intended to evaluate Matt in 9/87 to determine whether OT was a necessary service, and, if needed, appropriate goals and objectives would then be developed. 2. The weekly 1-1 speech/language

therapy would focus on expressive language to: (a.) provide self-monitoring techniques to deal with voice volume, (b.) Assist in monitoring extraneous gestures, and (c.) Promote careful sequencing of thoughts in a logical manner.

9. Denise Greene (B.S. University of New Hampshire with major in communications disorder, Master's in Special Education from the University of Virginia, certified in moderate special needs) was Matt's designated teacher in the 502.4 class, and also for the after-school component. She has been the principal teacher in the substantially separate 502.4 class at the Peabody Middle School since 9/86. Ms. Greene termed the proposed 502.4 class as language-based. A full-time tutor provides direct services under Ms. Greene's supervision; the teachers meet each Friday to review each student's--individual progress, share updated information, and discuss the next week's lesson plans. Ms. Greene stated that the 6 youngsters currently-in the program demonstrate a range of learning disabilities that are compatible with Matt's. Currently, 4 students are mainstreamed in math, and 3 in English classes. Since the gap in academic skill acquisition between regular education and special needs students usually widens in the 7th grade, Ms. Greene considered the achievement of maximum educational development and promoting self-esteem and confidence as critical concerns for the program.

Ms. Greene discussed the specifics of each special - education service designated in the IEP:

Daily Alternative English - Currently 4 students, taught by Ms. Greene, uses essentially the same texts and materials as the regular 7th grade class, but modified to assure contents acquisition and understanding. The class focuses on the mechanics of written language on 3 days, and on the remaining 2 days, the students are engaged in creative writing on computers that are permanently housed in the classroom.

Daily Alternative Math - Currently provided to one youngster by Ms. Greene using 7th grade regular education texts with varied supplemental materials, and largely following the regular class curriculum.

Daily Reading - Small group instruction delivered by the

tutor dealing with specific learning disabilities evidenced by the students, and geared to providing intensive reading remediation.

Daily Academic Tutorial - Tutor-directed small group or individual instruction intended to reinforce instructional materials in academic skill areas.

In-Class Support - If Matthew enrolled in mainstreamed science and/or social studies, the tutor would accompany him to every class to assist in note-taking, organization of materials, study skills, and reinforcement of presented instruction.

Socialization - Weekly session for the entire class conducted by the school psychologist, and attended by Ms. Greene, intended to promote social skills and appropriate peer interaction.

Occupational Therapy - If an evaluation, intended to be conducted in 9/87, indicated that Matthew would benefit from OT services (provided by a registered therapist), the service would be provided weekly on an individual basis.

Speech/Language Therapy - Individual weekly session delivered by a certified therapist to deal with the following specific areas attached to expressive language - intonation, sequencing and organizing thoughts, and modulating voice volume.

Ms. Greene testified that Matt could select from the following academic and non-academic options: technical art, music, foreign language, home economics, and woodworking. She stressed that the students in the 502.4 class participate in the full range of extra-curricular activities. They are integrated with regular education children in the normal flow of school activities.

In connection with the development of the 1987-88 IEP, Ms.Greene testified that she wrote the following sections (Exh. S-15-88): profile, special education services, and all academic goals and objectives. Her input cased at the conclusion of Performance Level #13 (page 108), and she did not write the goals and objectives for speech/language therapy and socialization. Although the Concord Public Schools utilizes a computer bank containing an array of available goals and objectives, Ms. Greene stated that she used computer bank materials only when they represented

Matt's specific special needs. When the computer goals and objectives did not reflect Matt's individual needs, Ms.Greene wrote them specifically directed to his deficit areas.

10. Dr. Barbara Miller, school psychologist (Ph.D. in Clinical Psychology with Specialization in Learning Disabilities from McGill University, and holding certifications in moderate special needs and as a school psychologist), conducts the weekly counseling 50-minute counseling group designated in the 1987-88 IEP.-Dr. Miller testified that the goals and objectives of the counseling component are: 1. To address the issue of self-esteem (sense of security, identity, purpose, confidence, and belonging), and to build and enhance the feeling of self-esteem; and 2. To address individual needs dealing with socialization skills. Each session is structured in a discussion format that focuses on a specific issue, and is augmented by role play to reinforce targeted skill areas. Based on her assessment of the students' attitudes, reports from parents, and day-to-day observations by teachers, Dr. Miller opined that the youngsters were successfully incorporating many positive aspects of the group experience into outside activities. Dr. Miller also stressed that each student's individual learning style is accommodated during group discussion to ensure understanding, participation, and the ability to generalize learned skills.

Dr. Miller's only direct interaction with Matt was limited to the psychological evaluation that she administered when Matt was in the 3rd grade. Her familiarity with Matt's constellation of special needs was gained from her review of available school records. In response to a query regarding alleged teasing of Matt by regular education children when he attended the Williard School, Dr. Miller testified that "teasing of the 6 students in the counseling group was not a problem at all this year. Five of the 6 students ride school buses, and there has been no incident of teasing". If teasing became a problem, Dr. Miller stated that appropriately directed discussion would enable the youngsters to understand the nature of the problem, and assist them to implement strategies dealing with teasing.

She stressed that all students in the group are exceptionally supportive of each other. Dr. Miller further underscored that "to my knowledge, teasing has never been a problem during the 4 or 5 years that the current program has been in effect at the Peabody Middle School.

FINDINGS AND CONCLUSIONS

Matthew M. is a child with special needs falling within the purview of 20 U.S.C. 1401 et seq and M.G.L. Ch. 71B. As such he is entitled to a free appropriate public education which assures his maximum possible educational development in the least restrictive environment consistent with that goal (David D. v. Dartmouth School Committee, 775 F2d 411 (1985)). Neither his status or entitlement is in dispute. Likewise, there is substantial agreement between the parties, as to the nature and degree of his special education needs. Essentially, Matthew presents a language disorder that impedes his academic progress. Further, he exhibits deficits in visual motor, visual tracking, and fine and gross motor skills. Although there is no dispute concerning his poor socialization skills, the extent of his emotional fragility remained a disputed issue. (Testimony of Carlson, Mr. and Mrs. M., Marcus, and Exhs. S-11-88, S-15-88)

The controversy in the instant matter centers on the following questions:

1. Whether the 1987-88 IEP proposed by the Concord Public Schools on 6/12/87 designating a 502.4 prototype, and later amended on 7/29/87 to provide an after-school component, was reasonably calculated to promote Matthew's maximum feasible educational benefits in the least restrictive environment or 2. Whether the complexity of his special education needs required a 502.6 residential placement at the Landmark School during 1987-88 in order to achieve his maximum educational development in the least restrictive environment.

Based on a careful analysis of the record (Exhs. P-1-88 to P-12-88, S-1-88 to S-27-88, B-I to B-5-BSEA, and 26 hours of recorded testimony), closing arguments submitted by counsel, and a review of applicable federal and state law, and pertinent judicial guidance, I conclude that:

1. The 1987-88 IEP proffered by the Concord Public Schools was reasonably calculated to allow Matthew M. to achieve maximum feasible educational benefits in the least restrictive environment, and comports with the legal requirements set forth under federal and state special education laws.

2. Conversely, Matthew's placement during 1987-88 in a 502.6 residential program at the Landmark School, which is the most restrictive learning setting contemplated under federal and state regulatory schema, was not required to promote his maximum feasible educational development in the least restrictive environment; Therefore, Concord is held harmless for any financial responsibility thereto.

Prior to rendering my evidentiary reasons for these conclusions, I shall deal with procedural issues raised by Mr. Berman in his brief. He argued that the 1987-88 IEP failed to comply with procedural requirements under Ch. 766. Specifically, he asserted that two intended service providers did not attend the TEAM meeting-on 5/26/87, that prioritization of learning problems was inaccurate, that current performance levels were missing, and that the IEP was largely computer-generated with minimal attention paid to Matthew's individual learning deficits.

First, Dr. Barbara Miller, school psychologist who provided the weekly counseling group to enhance socialization and peer interaction skills, testified that she was on maternity leave at the time of the TEAM meeting. Further, I find that the absence of, or a report from, Mr. Lucas, the designated academic tutor, does not constitute a serious flaw in the integrity of the proposed 1987-88 IEP. I find that the record is absent any evidence that Mr. Lucas had any prior contact with Matthew, and, therefore, had first-hand knowledge of his learning disabilities.

Further, the parents requested that Concord refrain from conducting any evaluations pending receipt of reports from private evaluators (Drs. Kinsbourne and Cushna), and the year-end testing from Landmark. Since this material was not available at the TEAM meeting on 5/26/87 (and, in fact, was not made available to Concord until late fall, 1987), I find that Mr. Lucas would have been unable to discuss specific remediation strategies at the TEAM meeting.

Next, the parents' refusal to allow Concord to conduct a 3-year reevaluation, and the inaccessibility of reports from Drs. Kinsbourne and Cushna, as well as Landmark, impacted significantly on Concord's ability to comply fully with the requisite regulations under Ch. 766 in developing the 1987-88 IEP. I find that Concord intended to reconvene the TEAM in September or October, 1987 to consider these reports and assessments in connection with the 3-year reevaluation (see letter from Steven Kaplan, Assistant Director of Student Support Services, dated 6/12/87, Exh. S-15-88, at pages 91-91). Under these circumstances, I find that Mr. Berman's procedural objections to the formulation of the 1987-88 IEP are without merit. Further, the record clearly shows that the parents' refused to consent to a 3-year reevaluation up to the time of the hearing.

I now address Mr. Berman's charge that Concord's use of a computer bank in preparing IEP's effectively denied to Matthew sufficient individualization so as to assure that the IEP was tailored to address his unique special needs. Denise Greene, Matthew's proposed teacher 1987-88, testified that she wrote the following sections: profile, special education services, and all academic goals and objectives. Her input ceased at the conclusion of Performance Level #13 (Exh. S-15-88, page 108), and she did not write the goals and objectives for speech/language therapy and socialization. Based on Ms. Greene's testimony, I find that Concord used the computer bank only when the materials were consistent with Matt's specific special needs. When the computer bank did not reflect accurately his individual deficit areas, I find that Ms. Greene tailored them to Matthew's specific needs. Accordingly, I dismiss, as unsupported by the record, Mr. Berman's assertion that Concord's use of the computer bank in preparing the 1987-88 IEP resulted in an inaccurate or incomplete representation of Matt's special needs.

I turn my attention to a comparison of the substantive merits of Concord's proposed 502.4 program and the 502.6 residential program at Landmark School during 1987-88 school year. I considered carefully the constraints imposed by 603 C.M.R. 500.0 that states in pertinent part: "... Children with special needs shall be placed outside the

regular educational environment only when the nature or severity of their special needs is such that education in a less restrictive educational prototype with the use of supplementary aids and services cannot be achieved satisfactorily." (emphasis added).

A starting point is a consideration of the professional credentials of Matt's proposed serviced providers in Concord, and his current teachers and supervisors at Landmark. It is undisputed that all personnel designated in Concord's IEP hold appropriate Massachusetts certification or licenture. They have been deemed by the Department of Education (DOE), or other state licensing agencies, to be qualified and competent to provide services to school-age handicapped children. I find that this is not the case at Landmark. Archibald Campbell, Director of Guidance and Campus Affairs, testified that four direct service providers to Matt during 1987-88 hold neither DOE special education or regular education certifications: Wendy Atwood Pragmatics/Oral Expression; Lisa Kendrick-language arts; Charlene Miller-mathematics; and Amy Landers-life science. Mr. Campbell's testimony was confirmed by Ms. Atwood and Ms. Kendrick who are responsible for remediating Matthew's specific language disabilities.

To determine whether Matt's teachers at Landmark engaged in a cohesive teaching approach, I relied on the testimony of Deborah Blanchard, his Case Manager, who is certified in moderate special needs, and Mr. Campbell. He testified that 16 or 17 of the current 47 teachers on the North Campus (Matt's learning site) hold moderate special needs certification; further, in service training comprises a one-week intensive summer course, augmented by four 2-hour seminars dealing with varied special education topics during the school year. Ms. Blanchard stated that teachers adhere to a generalized Landmark philosphy. The evidence is undisputed that Matthew's teachers did not meet as a group during 1987-88 to discuss him individually, and his specific learning deficits; to share updated information or progress; or to address an integrated, consistent teaching approach. My sense of Matt's teachers at Landmark is that, in the absence of special, or regular, education training and experience, they relied largely on their own resources to

provide instruction to Matthew, a language-impaired student, on a day-to-day basis.

In contrast, I find that Denise Greene, classroom teacher, was totally involved in Concord's proposed program. Not only was she the designated teacher in the after-school component, but Dr. Miller testified that Ms. Greene attended every session of the weekly counseling group. The record is abundantly clear that cohesion and integration were integral to Concord's program, and afforded Matthew's principal teacher the responsibility for dealing in a fully informed manner with the totality of his educational/emotional social special needs.

My focus is now directed to a discussion of the specific service provisions set forth by Concord in its 1987-88 IEP (Exh S-15-88). Ms. Greene testified that six students comprised her 502.4 language-based class, and that the range of learning disabilities were compatible with Matt. A full-time tutor is assigned to the class who works directly under Ms. Greene's supervision. They schedule meetings every Friday to review each student's progress, update relevant information, and plan the following week's activities. His plan called for small group instruction in: reading, grouped with two other students, concentrating on decoding and comprehension skills; alternative math, with two other students, with additional concentration on language skills; and alternative English, with five students, using a "language experience" approach through classic adventure books, and student-developed plays. A daily small group academic tutorial was incorporated to assist Matthew in the acquisition of appropriate organizational and study skills. In addition to the weekly socialization group directed by Dr. Miller, and attended by Ms. Greene, related services included two weekly sessions of speech/language therapy, and a weekly period of occupational therapy to deal with his fine motor deficits, if deemed necessary following on OT assessment.

Based on Concord's perception of Matt's strong reading comprehension skills, they offered Mr. and Mrs. M. the option of choosing regular education social studies and science, or to have these courses provided within the self-contained 502.4 class. If the parents preferred the

mainstreamed setting, Ms. Greene and the tutor would have provided additional assistance, and small group academic support was offered on a daily basis in the Learning Center.

Considerable attention was devoted at the hearing, and in Mr. Berman's closing argument, to the reasons that Concord amended the 1987-88 IEP on 7/29/87 to include an after-school recreational/socialization program. This service would be conducted in two-hour sessions, 2-3 times weekly-depending on Matt's adjustment and ability to generalize his social skills. I find incontrovertible support that Concord did not receive BSEA's decision on #87-0073, dealing with the 1986-87 school year, until some time after the TEAM meeting on 5/26/87. Since Hearing Officer Carol Kervick ordered Concord to "reconvene the TEAM to write an IEP including after school services to provide Matthew with meaningful opportunities for peer relationships" (Exh. S-14-88), Concord complied on 7/29/87 (Exh S-11-88).

The meeting was attended by Mr. and-Mrs. M., Karl Pulkkinen of Landmark School; Susan Carlson, Director of Student Support Services, and Mr. Kaplan, Assistant Director under Ms. Carlson. I am persuaded by the testimony of Mr. M., Ms. Carlson, and Mr. Pulkkinen that the format and frequency of this provision was fully explored and discussed by the participants, and augmented by considerations posed in Exh. S-22-88. Mr. and Mrs. M. rejected the revised IEP on 8/28/88. I conclude, based on Mr. M's. testimony, that the parents had decided prior to 7/29/87 to return Matthew to Landmark for the 1987-88 school year, and it was unlikely that they were prepared to accept an IEP for 1987-88 that offered services within the Concord Public Schools.

At this juncture, I will comment on a procedural discussion that took place during the hearing on 3/8/88 pursuant to receipt by the hearing officer of a letter from Mr. Berman, dated 3/2/88 (Exh B—3), to quash subpoenas to Drs. Cushna, Kinsbourne, and Marcus (professionals involved in Matthew's treatment), requested by Mr. Sullivan. Essentially the discussion between Mr. Berman, Mr. Sullivan and me revealed the following undisputed facts: (For a virtually complete transcript of the discussion, see Mr. Sullivan's closing brief at pages 34-36):

(1). Mr. Berman agreed that Drs. Cushna, Kinsbourne, and Marcus had "relevant information dealing with the issues before this hearing".

(2). Mr. Berman dismissed the "notion that you (hearing officer) have an obligation to the child".

(3). Mr. Berman stated that he didn't "have a great deal of faith in the integrity of the administrative process".

In carefully analyzing the evidentiary standard of review, as enunciated in Town of Burlington v. Department of Education, 736 F.2d 773 (1984), at pages 30-36. I relied on the following dicta, in pertinent part:

"A trial court must make an independent ruling based on the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial... The determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo. (emphasis added)

"... a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources." (emphasis added)

I find incontrovertible evidence upon which to conclude that Mr. Berman's effort to quash subpoenas to Drs. Cushna, Kinsbourne, and Marcus, requested by Concord, stemmed from his intent to withhold relevant evidence from the administrative hearing, to demean the statutory role of administrative expertise, and to bypass the due process framework generated by federal and state provisions in order to consolidate this decision, with the prior decision, in Federal District Court. I find that the U.S. Court of Appeals supra has held that the court places weight, reliance, and credibility on the administrative record, and that the court considers it unfair for a party to reserve its best evidence for trial.

This procedural discussion now leads me to a consideration of Matthew's emotional health - the main

thrust of the parents' argument to maintain his residential placement at Landmark. In determining the nature of Matt's emotional/social special needs, and whether these needs could be met appropriately during 1987-88 in the Concord Public Schools, I weighed the testimony of Dr. Michael Marcus, psychiatrist. Dr. Marcus is Board certified in child/adult psychiatry, and has been in private practive exclusively since 1983 with two-thirds of his practive dealing with children and adolescents, and one-third with adults. Dr. Marcus' first meeting with the parents was on 10/29/87, and to the date of his testimony, he had seen Matthew individually during thirteen 45-minute sessions every two or three weeks.

Dr. Marcus testified that the focus of his therapy with Matt were issues dealing with self-esteem and peer acceptance. He observed that Matthew shuffles in his chair a lot, that Matthew demonstrates no unusual hand motions, and that Matthew evidences much anxiety that Dr. Marcus considered as "normal for any adolescent".

Dr. Marcus related that the only time Matthew threatened self-harm was if he could not remain at Landmark. However, Dr. Marcus testified that he did not advise Mr. and Mrs. M, or professionals at Landmark. In fact, Dr. Marcus acknowledged that he has not spoken directly to any Landmark professional during his treatment of Matthew, and reviewed only the 1/88 Landmark progress reports (Exh. P-12-88).

Dr. Marcus was not present during Dr. Miller's description of the weekly counseling small group designated in the 1987-88 IEP. However, he testified that he considered compatible group therapy appropriate since issues of social interaction and self-esteem are normally addressed, and it is likely that Matthew would have benefitted. Further, Dr. Marcus stated that he conducts therapy groups for three different age-ranges that allow youngsters to remain in public school settings despite their learning and social interaction problems.

Based on the evidence cited supra, I am unpersuaded that Matthew's problems with self-esteem and peer interaction were so severe as to warrant a 502.6 residential placement at the Landmark School. Clearly, Concord had

in place a small therapy group designed to address the identical issues that are the focus of therapy by Dr. Marcus. I find support in Dr. Miller's testimony that she had the expertise and experience, gained over 4 or 5 years of implementing the counseling group at the Peabody Middle School, to remediate Matt's emotional/social special needs. Buttressing my support is Dr. Marcus' testimony that children attending his therapy groups are able to remain in public school systems despite their learning and social interaction problems. Absent in the record is any compelling evidence upon which to conclude that Matthew's educational/social/emotional problems required a residential placement at Landmark during 1987-88 - the most restrictive learning environment envisioned under federal and state special education schema.

I am cognizant of Matt's behavioral gains as described by Mr. M.: (I) More helpful around the house, (2) Improved relationship with his brother, (3) Demonstrates affection to family members, (4) More acceptable to neighborhood friends, (5) Dramatic improvement during visits to homes of family, (6) Responsible for returning home on time from outside activities; and (7) More appropriate behavior at restaurants and shopping malls.

Although these behavioral gains speak to a level of maturation achieved by Matt, I am unconvinced that a nexus exists with his enrollment at Landmark. First, Dr. Marcus testified that he had no direct contact or conversation with any Landmark professional during 1987-88. Therefore, apparently no sharing of information took place that would allow direct service providers at Landmark, academic and residential, to assist Matt in generalizing any skill gains derived from his therapeutic sessions with Dr. Marcus. The record further shows that Landmark provided neither individual nor group counseling to Matthew, and that intended psychological screening was intended to be implemented in early fall 1987, but was never done.

I conclude, based on the testimony of Mr. and Mrs. M., that the main reason that they maintained Matthew's residential placement at Landmark during 1987-88 was his fear of continuing scapegoating in the Concord schools that allegedly took place in earlier grades. I rely on Dr. Miller's

testimony that no incidence of scapegoating was reported by any student in the counseling group during 1987-88, and that if it had occurred to Matthew, she would have addressed the problem in an expert, competent, and sensitive manner.

Based on the voluminous testimonial and documentary evidence before me, I find that the 1987-88 IEP proposed by the Concord Public Schools on 6/12/87, and later amended on 7/29/87 to provide an after-school component, was reasonably calculated to promote Matthew M.'s maximum feasible educational benefits in the least restrictive environment, as mandated by the legal requirements pursuant to 20 U.S.C. 1401 et seq and M.G.L. Ch. 71B. In fact, considering the totality of Matthew's special educational/emotional/social needs, and the calibre, expertise, and competence of his proposed direct service providers at Concord responsible for addressing these special needs, I find that Concord's 1987-88 program far exceeds his educational program at Landmark School. Accordingly, I find that the Concord Public Schools are not financially responsible for Matthew M.'s 502.6 residential placement at the Landmark School during 1987-88 school year.

LIST OF PARENTS EXHIBITS

P-1-88	Landmark Staff/Student Ratio: Fall Schedule '87-'88
P-2-88	Landmark Staff/Student Ratio: Spring Schedule '87-'88
P-3-88	Letter from Dr. Bruce Cushna to Steven Kaplan 2/1/88
P-4-88	Teacher Assignments at Landmark with Resumes, Certifications, References: 1987-1988
P-5-88	Diagnostic Educational Reports: 11/6/87
P-6-88	Comparative Test Results with Most Recent Protocols: 7/86 to 10/87
P-7-88	Letter from Kirk Swanson to the Parents: 5/29/87
P-8-88	Disciplinary Committee Report: 6/1,/87

P-9-88	Objectives for Pragmatics/Oral Expression Class: 1987-1988
P-10-88	Auditory/Oral Expression Placement Test: 9/10/87
P-11-88	WISC: 11/12/86
P-12-88	Landmark Progress Reports: 1/88

LIST OF CONCORD'S EXHIBITS

S-1-88	2/5/88; letter from to Kaplan from Merrifield.
S-2-88	2/3/88; letter to Berman from Sullivan.
S-3-88	2/3/88; letter to Merrifields from Kaplan.
S-4-88	1/29/88; letter to Merrifields from Kaplan.
S-5-88	1/22/88; letter to Cushna from Kaplan.
S-6-88	Psychological Study-Bruce Cushna with copy of certified envelope.
S-7-88	11/25/87; memo-Phyllis Kermack, Secretary Student Support Services with attachments.
S-8-88	11/23/88; letter to Merrifields from Carlson.
S-9-88	11/9/87; letter to Merrifields from Carlson.
S-10-88	9/11/87; letter to Kervick from Carlson.
S-11-88	7/30/87; letter from Carlson to Merrifields with the Amendment to IEP and IEP.
S-12-88	7/14/87; letter to Betsy Burch from Kaplan.
S-13-88	7/14/87; letter to Kervick from Kaplan.
S-14-88	Decision - Bureau of Special Education Appeals Matthew M. v. Concord Public Schools.
S-15-88	6/12/87; letter to Merrifields from Kaplan with IEP for 1987-1988.
S-16-88	4/23/87; letter to Merrifields from Carlson.
S-17-88	1/11/88; letter to Kristen Apgar from Richard Sullivan.
S-18-88	7/24/87; letter from Archibald Campbell to Pamela Kaufmann.
S-19-88	5/8/87; letter from Charles Harris to Lorraine Moore.
S-20-88	6/6/86; letter from Ms. Moore to Mr. Campbell.
S-21-88	1/20/87; letter from Ms. Kaufmann to Charles Drake.

S-22-88	7/23/88; Considerations for after-school program.
S-23-88	Notes by Susan Carlson: 5/29/8 Notes by Denise Greene: 5/26/87
S-24-88	Goals and Objectives.
S-25-88	Vita of Dr. Barbara Miller.
S-26-88	List of Proposed Teachers: 1987-1988.
S-27-88	PPVT-6/86

LIST OF BSEA EXHIBITS

B-I	Subpoena issued to Mr. R.M.: 2/14/88
B-2	Subpoena issued to Archibald Campbell: 2/16/88
B-3	Letter from David Berman to Phyllis Ryack: 3/2/88
B-4	Subpoena to Dr. Michael Marcus: 3/23/88 Letter to Ms. Apgar from Dr. Marcus: 3/25/88
B-5	Subpoena to Dr. Marcus: 5/6/88

RECORD OF THE HEARING

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request. M.G.L. c. 30A §11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A 51t(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.
>
> 30A §14(4) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education Appeals for

certification within 35 days of service of a copy of a petition for review upon the agency.

RECONSIDERATION OF DECIS10N:

.Reconsideration of the case may be granted upon the showing of any serious error of law; misconstruction of the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals, such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEALS:

The public school and the parent,may file a petition for review in the Superior Court of competent jurisdiction or in the District Court of the United States. Appeals to Superior Court must be filed within 30 days after receipt of the Final Decision of the Bureau of Special Education Appeals. The Decision is final and must be implemented immediately, unless the case is appealed to court. While a court appeal is pending, the public school is responsible for maintaining the child in the program !ast agreed upon by the school and the parents unless the party seeking a change of that placement obtalns a preliminary injunction in court ordering the change. Regardless of which party pays for a child's private school placement while a court appeal is pending, ultimate fiscal responsibility may rest with the party that loses in court (Burlington S.C.v. DOE, 105 S.Ct. 1996 (l985)).

Any party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child (i.e., use only child's first name or John or Jane Doe) and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

*/s/*_____
HEARING OFFICER

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 87—2107—Z

ROLAND M. and MIRIAM M..

VS. .

THE CONCORD SCHOOL COMMITTEE and HAROLD RAYNOLDS, JR.,as he is Commissioner of the MASSACHUSETTS DEPARTHENT OF EDUCATION

PRETRIAL ORDER

ZOBEL, D.J

This matter having come before the Court at a pretrial conference held pursuant to Rule 16, Fed. R. Civ. P., 28 U.S.C., and

David Berman, Esq.
Berman and More
100 George P. Hassett Drive
Medford, Mass. 02155

having appeared as counsel for plaintiffs, and

Richard N. Sullivan, Esq.
Kenney, Conley, Sullivan & Smith, P.C.
100 Grandview Road
Post Office Boy 9139
Braintree, Mass. 02184

having appeared as counsel for defendant, Concord School Committee, and

Richard M. Brunell, Ass't Atty. General
One Ashburton Place, Rm. 2019
Boston, Mass. 02108

having appeared as counsel for defendant, Commissioner of the Massachusetts Department of Education, the following action was taken:

1. TRANSCRIPTS

January 23, 1989. They shall at the same time provide a copy to the Town at its cost.

2. DISCOVERY

Any further submissions concerning the Town's motion in limine opposing the admission of additional evidence shall be filed by February 6, 1989. The Court will decide whether to hear argument after a review of the papers.

3. TRIAL

A non-jury trial is scheduled to commence on April 6, 1989, at 9:00 a.m., and is expected to last 1-2 days.

4. ISSUES

(a) With respect to the 1986/87 school year i. whether the IEP provided the most appropriate placement, given that it contained no after school component; and
ii. whether the Commissioner of the Massachusetts Department of Education had the legal or equitable authority to order the Town to pay one-half of the private school costs, given his findings.

(b) With respect to the 1987/88 school year
i. whether the Landmark School was the most appropriate placement, given the child's progress in 1986/87;
ii. whether the IEP was developed in accordance with the correct legal standard; and
iii. whether the hearing officer applied the correct legal standard.

5. EXHIBITS

The parties agree that the only exhibits in evidence are:

i. the transcripts of the hearings; and

ii. the exhibits introduced at the hearings.

/S/January 20 1989 */S/ DISTRICT JUDGE*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 87-2107-Z

ROLAND M. AND MIRIAM M.,
PLAINTIFFS

V.

THE CONCORD SCHOOL COMMITTEE AND HAROLD RAYNOLDS, JR., AS HE IS COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF EDUCATION,
DEFENDANTS

MOTION IN LIMINE IN OPPOSITION
TO ADMISSION OF ADDITIONAL EVIDENCE

Now comes the Defendant Concord School Committee and requests, in limine, that the Court preclude the admission of additional evidence in this civil action. In support thereof,the Defendant asserts:

1. The Plaintiffs withheld the testimony they now seek to introduce in court as additional evidence in a deliberate attempt to undercut the statutory role of administrative expertise and receive a trial de novo in clear contravention of the law; and

2. The Plaintiffs' attempt to introduce additional evidence at this time, contravenes the procedural framework mandated by the Education of the Handicapped Act, is inherently unfair, and encourages parties to reserve evidence for the review process rather than presenting their case in its entirety at the administrative level.

/S/ Allowe
R. Zobel, J.
3/10/89

Filed in open court 1/19/89

UNITED STATES DISTRICT COURT
DISTRICT COURT OF MASSACHUSETTS

vs.

CIVIL ACTION NO. 87-2107—Z
ROLAND M. AND MIRIAM M.

THE CONCORD SCHOOL COMMITTEE, ET AL

MEMORANDUM OF DECISION

ZOBEL, D.J.

I. PROCEDURAL BACKGROUND AND FACTS:

Plaintiffs' son, Matthew, is a student with special needs as defined by the Education of the Handicapped Act, 20 U.S.C. § 1401 (EHA) and Mass. Gen. L. ch. 71B. He is entitled to receive an education that will "assure his maximum possible development in the least restrictive environment consistent with that goal." *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 423 (Ist Cir. 1985), cert.den., 475 U.S. 1140 (1986).

In 1980, Matthew began school in the Concord public school system. At that time, Matthew was placed in Kindergarten at the Thoreau school with a supplemental afternoon session in the Therapeutic Preschool Program. This arrangement followed evaluations by Dr. Szymanski (a psychiatrist), by Dr. Cushna (a psychologist), a TEAM meeting, and a detailed IEP developed in accordance with the requirements of the EHA. The psychiatric and psychological evaluations made by Drs. Szymanski and Cushna found that Matthew had serious visual perceptual problems, poor concentration, and had trouble settling down. Matthew's teachers and other experts who examined him also universally agreed that Matthew had weak fine motor skills. In 1980, testing revealed Matthew to have an IQ of 88 and a Binet Mental Age of 5 1/2 (at the time, Matthew was 5).

Matthew remained in the Concord public school system

until the end of the 1985/86 academic year. By that time, Matthew was spending most of his class time in a special self-contained classroom; he was integrated into regular classes for four hours each week. He was testing in the "average" IQ range but still showed evidence of hyperactivity, poor concentration, and weak fine motor skills. He also had trouble relating to his peers in school. In 1985, Matthew was diagnosed as having "attention deficit disorder."

At the end of the 1985/86 school year, Matthew had finished his program at the Willard public school and arrangements needed to be made for his future educational placement. In August 1986, the Concord School Committee developed an IEP placing Matthew in a day program at the Peabody School (a public school). On September 9, 1986, plaintiffs rejected the proposed IEP and placed Matthew in a private residential program at the Landmark School.

In February and March of 1987, the Bureau of Special Education Appeals (BSEA) conducted an administrative hearing regarding the appropriate placement for Matthew during the 1986/87 school year. On 29 June 1987, the hearing officer (Hearing Officer I) rendered her decision. She concluded that "the Concord 502.4 placement [wa]s superior to the Landmark 502.5 program in credentials and experience of staff, methodology, extent and types of services, [and in] opportunity for mainstreaming." The hearing officer found, however, that since Matthew's parents had acted reasonably in placing him in the Landmark School, they were entitled to receive reimbursement for costs incurred during the fall semester. But the hearing officer also found that the Landmark School was not to be considered the 'last agreed upon placement' for the purposes of 'placement pending appeal.'

In response to the plaintiffs' motion for reconsideration and clarification, Hearing Officer 1 stated that the parents were entitled to reimbursement because, when they placed Matthew in the Landmark School, they had acted reasonably given the procedural and substantive inadequacies of the Concord IEP at that time. Since those inadequacies were cured in January 1987 and the original defects were minor, the hearing officer reiterated that the

Concord IEP was the proper placement for Matthew from January 1987 forward and that the Landmark School was not to be considered the placement pending appeal.

In May 1987, before a decision in the first BSEA hearing, Concord developed an IEP specifying a 502.4 placement within the public school system for Matthew's 1987/88 upcoming school year. Plaintiffs rejected this plan on July 10, 1987. Following the BSEA decision which criticized Concord for failing to include an after-school socialization component in the 1986/87 IEP, Concord prepared a new IEP for 1987/88 to include an after-school component . On August 29, 1987, this plan was also rejected by plaintiffs.

In August of 1987, plaintiffs filed this action under 20 U.S.C. § 1415(e) (2) seeking enforcement of the reimbursement order, reversal of the finding that Concord was the better placement for the second term of the 1986/87 school year, and attorneys' fees.

Concord appealed the plaintiffs' rejection of the 1987/88 IEP to the BSEA. This court proceeding was then stayed pending the outcome of the administrative appeal. On August 24, 1988, the hearing officer (Hearing Officer 2) rendered a decision holding in substance that, despite acknowledged procedural defects in its preparation, the 1987/88 IEP generated by Concord was appropriate. Plaintiffs then amended their complaint to include challenges to Hearing Officer 2' s decision regarding the 1987/88 placement.

Plaintiffs, by their amended complaint, assert that the placement prescribed in the IEPs for 1986 through 1988 was inappropriate, that Landmark was the proper placement, that Hearing Officer 1 incorrectly required Matthew to transfer to Concord public schools during the second term of the 1986/87 year, that procedures were not adhered to in the preparation of the 1987/88 IEP, and that Hearing Officer 2's decision is substantially unjustified and is tainted by bias and error of law.

II. ANALYSIS:

A. Scope of Review and Hearing Officers Findings of Fact

The EHA provides that a court "shall receive the record of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2). Although the courts may hear additional evidence,[1] the judicial proceeding is not to be considered a trial de novo and "due weight" must be given to the administrative proceedings. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982); David D., 775 F.2d at 424 (citing *Colin K v. Schmidt*, 715 F.2d 1, 5 (lst. Cir. 1983); *Burlington v. Department of Educ.*, 736 F.2d 773 (lst Cir. 1983), aff'd, 471 U.S. 359 (1985); *Doe v. Lawson*, 579 F.Supp. 1314, 1316 (D.Mass.), aff'd, 745 F.2d 43 (lst Cir. 1984); *Lang v. Braintree School Comm.*, 545 F.Supp. 1221, 1226 (D.Mass. 1982).

Both hearing officers found that Matthew is deficient in visual motor, visual tracking, and fine and gross motor coordination skills. They also found that Matthew had difficulty relating to his peers. Their conclusions are amply supported by the evidence. Matthew's teachers, attending physicians, therapists, and parents had noted the same problems as early as 1980 and as recently as 1986.

I find that the record does not support the conclusion that Matthew suffered from Attention Deficit Disorder.

Although neither hearing officer commented on Matthew's intelligence, the record plainly reveals that Matthew consistently tests in the "average" range of intelligence.

I find, therefore, that Matthew has deficient visual motor, visual tracking, and fine and gross motor coordination skills.

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[1] Earlier in this action, I denied plaintiffs' motion to admit additional expert testimony on the ground that plaintiffs had deliberately withheld that testimony at the administrative hearing.

I also find that Matthew has difficulty relating to his peers and is of average intelligence.

B. Appropriate Education

The EHA requires that each handicapped child receive an "appropriate public education." 20 U.S.C. § 1401(18). The federal definition of an appropriate education is one that permits the child to "benefit" from the instruction. Rowley, 458 U.S. at 189. The Massachusetts standard is higher, however, since state law defines an appropriate education as one that "assure[s] the maximum possible development" of the child. David D., 775 F.2d at 423 (citing Stock v. Massachusetts Hosp. School, 392 Mass. 205, 211, 467 N.E.2d 448 (1984)). Since both the federal and the state Acts require that education be provided in the least restrictive environment, 20 U.S.C. § 1412(5); Mass. Regs. Code tit. 603, ¶110.0, the correct question to ask when assessing an educational plan under the EHA in Massachusetts is whether the plan addresses the child's special educational needs so as to assure his maximum possible development in the least restrictive environment consistent with that goal. David D., 775 F.2d at 423

1. 1986/87.

Concord's 1986/87 IEP stated that Matthew's educational needs would be best met in a closely structured environment. In this regard the IEP was in accord with what Matthew's attending psychiatrist, psychologist, and parents felt would be most beneficial for Matthew. The IEP placed Matthew in special self-contained classes for 11.25 hours each week. The IEP placed Matthew in regular classrooms for Social Studies and Science for 7.5 hours each week. During these regular classes, Matthew was to be assisted by an aide. In addition, the IEP provided one hour of "socialization" therapy with a school psychologist, 1/2 hour of occupational therapy designed to improve his motor skills, and 1.5 hours each week of speech and language instruction. The regular classroom placements were consistent both with Matthew's own need to have better relations with his peers and with the EHA's strong bias in favor of 'mainstreaming' to the maximum extent appropriate. See 20 U.S.C. § 1412; Honig v. Doe, 108 S.Ct. 592, 597 (1988).

In light of Matthew's educational needs which, as stated above, related to his problems with visual motor, visual tracking, fine and gross motor skills, and poor relations with his peers, I find that the 1986/87 IEP proposed by Concord was designed to maximize Matthew's possible development. The plan correctly identified Matthew's weaknesses and set out a program to address them. It is not the court's province to second guess the methodological approach chosen by professional educators. See Rowley, 458 U.S. at 208. My finding is supported by Matthew's progress during previous similar Concord programs. In November 1986, Dr. Cushna stated that Matthew's progress over the previous two years was "most astonishing." Although the evaluation took place three months after Matthew had entered the Landmark School, at least one and one-half years of Matthew's astonishing progress took place during his IEP placement.

Even assuming that the Landmark program in 1986/87 was able to promote Matthew's maximum possible development, it is not an "appropriate" education within the meaning of the EHA because it is not the least restrictive placement in which such development could take place. Because the Concord 1986/87 IEP was designed to maximize Matthew's possible development and was the least restrictive environment consistent with that development, the Concord placement was "appropriate."

2. 1987/88

The 1987/88 Concord IEP was developed on the basis of achieve success and to assist him to develop socialization skills in an integrated setting with normal and handicapped peers." BSEA 1 at 2. The modified IEP provided four to six additional after-school hours each week in which Matthew would participate in an activities group that would include handicapped and nonhandicapped children. The program was to include "low competition sports activities as well as 'club' kinds of activities."

The 1987/88 IEP was designed to maximize Matthew's possible development to the extent that Matthew's condition was known at that time. Since recent evaluations of Matthew's progress were not available to the TEAM at the IEP development meeting, the 1987/88 IEP

was developed largely on the basis of the information available at the time of the creation of the 1986/87 IEP. The 1987/88 IEP addresses Matthew' s problems in the same way as did the 1986/87 IEP. This is not surprising given the fact that the information upon which it was based was largely the same. The fact that Hearing Officer 1 suggested that a socialization program be added to the 1986/87 IEP is not enough to render the original 1987/88 IEP inappropriate for Matthew ' s needs . The hearing officer expressly found that the 1986/87 IEP was appropriate without the socialization component. Likewise, the fact that the TEAM modified the original 1987/88 IEP to add an after school socialization component is not enough to show that the original 1987/88 IEP was inappropriate within the meaning of the EHA. To find otherwise would only discourage schools from exploring new methods to meet the handicapped child's needs for fear that such exploration would open them to charges that previous IEP's were inadequate

There is uncontroverted evidence that Matthew made "remarkable" progress in his first year at the Landmark School. But Matthew's progress at the Landmark School is irrelevant to the question of whether the Concord program was appropriate to maximize his possible development. It is not necessary to compare the two programs to determine whether the Concord IEP was designed to provide an adequate education.

It should be emphasized that an "appropriate" education is not simply one that maximizes the child's possible development. It is also the least restrictive education consistent with that development. The level of restriction and the educational value of the program must be assessed together in order to determine whether the program in its entirety is an "appropriate" education within the meaning of the EHA. As with the 1986/87 IEP, the 1987/88 IEP placed Matthew in a non-residential day program, the least restrictive placement that could meet his needs.

C. Procedural Requirements

Congress placed as much emphasis upon compliance

with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard. Burlington, 736 F.2d at 783 (citing Rowley, 458 U.S. at 205--06). The procedural safeguards of the EHA are supplemented by those of the state regulations to the extent that those regulations do not conflict with the federal law. Cf. David D., 775 F.2d at 423. The Supreme Court has stated that 'adequate' compliance with the procedural requirements would most likely produce a substantively adequate IEP. Rowley, 458 U.S. at 208. Thus, a procedural deficiency would not necessarily render an IEP inadequate but full compliance with procedural requirements would likely produce an adequate IEP.

Plaintiffs here claim that the development of the 1987/88 IEP had serious procedural defects such that the resulting IEP was inadequate and they had the right to reject it and enroll Matthew at the Landmark School. They assert four procedural defects in the preparation of the IEP: I) that the TEAM's composition was defective; 2) that some people not present at the TEAM meeting contributed to the preparation of the IEP; 3) that the IEP did not specify a program for mainstreaming; 4) that the use of a computer generated IEP resulted in a "mindless" IEP. I find that the procedural defects in the preparation of the 1987/88 IEP taken together are of a degree insufficient to render the IEP inadequate.

1. Composition of the TEAM

The Code of Massachusetts Regulations sets out the required composition of the TEAM writing an IEP. Mass. Regs. Code tit. 603, ¶311. The regulations require, among other things, the presence of "a teacher who has recently had or currently has had the child in a classroom or other teaching situation." Mass. Regs. Code tit. 603,¶311.2. Present at the TEAM meeting to prepare the 1987/88 IEP were: Mr. Kaplan, Assistant Director of Student Support Services; Ms. Carlson, Director of Student Support Services; Ms. Greene, Special Education Teacher at the Peabody School; Mr. Pulkkinen, Public School Liaison at the Landmark School; and the plaintiffs. It is undisputed that neither one of Matthew's current nor recent teachers attended the TEAM meeting. There is evidence that Mr.

Pulkkinen of the Landmark School was able to provide information about Matthew's current educational achievement. As such, Mr. Pulkkinen was able to provide the same educational information that the regulations seek to ensure will be available for the preparation of an IEP. Thus, the fact that a teacher did not provide the information is a minor procedural defect.

The regulations also require the presence of "other individuals who have conducted assessments as described in paragraph 319.3 as part of the evaluation, provided that the TEAM shall include at least one teacher or other specialist trained in the area of the child's suspected special needs." Mass. Regs. Code tit. 603, ¶ 311.6. Paragraph 319.3 provides for assessments by doctors, psychologists, nurses, guidance counselors, and social workers. Ms. Greene, a teacher trained in the education of children with emotional disturbances and learning disabilities, was present at the TEAM meeting but no other specialist was present. Specifically, Dr. Cushna, Matthew's attending psychologist, was not present. Dr. Cushna's absence is a defect according to the regulations but I find that it is not a significant defect in this case. Burlington stated that a school could not use the parents' refusal to allow a three-year evaluation of their child as an excuse for not preparing an IEP. Burlington, 736 F.2d at 795. Here, the school prepared an IEP[2] but did so without current psychological evaluation of Matthew or the presence of his psychologist. Plaintiffs had requested that the school committee refrain from independently testing Matthew as evaluations would be forthcoming from Drs. Cushna and Kinsbourne. As noted above, those evaluations were not made available until long after the formulation of the IEP. If these evaluations did not take place in the period immediately preceding the TEAM meeting, it is hard to imagine what contribution Dr. Cushna's presence would

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[2] Burlington states that schools should continue to prepare IEPs to the best of their ability even when the child has been removed from the public school system. Burlington, 736 F.2d at 794.

have made at the meeting beyond the information

contained in his last written evaluation. If these evaluations had been made at the time of the TEAM meeting but not made available to the school committee, the school should not be penalized for the parents' withholding of information.

2 Contribution to the IEP by non-TEAM participants

Plaintiffs claim that three people made contributions to the IEP who were not at the TEAM meeting: a tutor named Mr. Lucas, the school psychologist Dr. Miller, and "Dawn" who was one of Matthew's speech and language pathologists at his last public school. There is only evidence to support plaintiffs' claim with respect to Dawn. According to Ms. Greene's testimony at the appellate administrative hearing, Dawn prepared performance level 14 of the 1987/88 IEP. It is true that having a non-TEAM participant prepare part of the IEP violates the strong legislative policy in favor of full parental notification and participation, S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), but it seems counterproductive to hold that a teacher most familiar with the student's work be excluded from preparing the IEP simply because she was not present at the TEAM meeting. As a procedural defect, it is de minimis in this case where Dawn's contribution was limited to the performance level in which she specialized and knew Matthew's abilities. There is no evidence to suggest that Dawn participated in the preparation of any other portion of the IEP.

3. Mainstreaming

Paragraph 322.1(n) provides that the IEP shall include "[a] statement describing the child's participation in the regular education program [and the criteria for the child's movement to the next less restrictive prototype." Plaintiffs claim that the IEP did not include such a statement on "mainstreaming." The "Student Profile" page of the 1987/88 IEP, however, states the amount of time that Matthew would be spending in regular classes at the Peabody School. Participation in regular classes is "mainstreaming" and thus a statement of the amount of time that Matthew would be spending in regular classes is a statement on mainstreaming. Furthermore, the same page of the IEP states that Matthew would be considered for placement in a less restrictive prototype "when in-class support is no longer needed in academic areas." This is a

clear statement of the criterion that would be used to determine Matthew's progression to a less restrictive placement. Thus, there is no violation of paragraph 322.1(n).

4. Computer-Generation of the IEP

Plaintiffs assert that Ms. Greene used Concord's computerized master IEP forms in such a way that Matthew's IEP was 'mindlessly generated.' As evidence of this they point to the fact that the IEP indicates that many of the objectives in some levels would be addressed in all four quarters. How, plaintiffs argue, can the first objective in a level and a subsequent objective both be addressed in all four quarters? It is true that the IEP form as worded is confusing. Ms. Greene explained in her testimony, however, why the IEP was generated in this form:

> Ms. Greene [All four quarters were listed for each objective because] the possibility existed that Matthew might be able to --- I might be able to address with Matthew all of those [objectives] and meet all of those within one quarter or one semester. . . . I did not know how rapidly he would progress through the objectives.

I disagree with the plaintiffs that the overlapping assignment of quarters for different objectives supports the conclusion that "Ms. Greene considered Matthew unteachable or . . . she had no idea of the real Matthew for whom the IEP was prepared." The IEP reflects Ms. Greene's best attempt to generate an IEP (as the school system was required to by state and federal law) without personal knowledge of the child whom she was scheduled to begin teaching the following year and of whom there was no current personal knowledge within the public school system. Although the plaintiffs' objection could have been averted by the simple addition of words explaining that Matthew's pace through the stated objectives would be clearer once Ms. Greene had taught Matthew for a while, the parents could have requested clarification of the IEP according to paragraph 325.1(c) of the regulations if that was the basis of their objection to the IEP. Finally, plaintiffs claim that the 1987/88 IEP did not satisfy paragraph 322.1(d) which provides that the IEP shall contain "[a]

statement of the general (I year) educational objective[s] listed in order of priority." Ms. Greene testified that the overall objectives (called 'levels' in the IEP) were not listed in any particular order. I find that this is not a significant procedural defect.

I find, therefore, that the procedural defects in the preparation of the 1987/88 IEP taken together were not sufficient to render the IEP inadequate.

D. Reimbursement and Attorneys' Fees

Plaintiffs claim that they are entitled to reimbursement for costs associated with sending Matthew to the Landmark School. Parents, however, are not entitled to reimbursement of private school costs if they "are incorrect in their claim that the IEP provides an inappropriate education." Burlington, 736 F.2d at 798. Since the IEPs at question here both provided an appropriate education, plaintiffs are not entitled to reimbursement of costs incurred by sending Matthew to the Landmark School. Hearing Officer 1 found that the plaintiffs were entitled to partial reimbursement for Matthew's first semester at the Landmark School because they had acted reasonably in placing Matthew at Landmark. The Act nowhere provides for reimbursement of costs incurred from a "reasonable" placement decision by the parents. Reimbursement is only available if the parents' educational placement choice is ultimately determined to be correct. Thus, the hearing officer erred in ordering reimbursement as a matter of law and that portion of the hearing officer's decision is reversed.

Plaintiffs are also not entitled to attorneys' fees under 20 U.S.C. § 1415(e)(4)(B).

III CONCLUSION

For the foregoing reasons, the BSEA decision finding both IEPs appropriate is affirmed and that portion of the decision granting reimbursement is reversed. Judgment may be entered accordingly.

/S/ October 27,1989
DATE

/S/ R. Zobel
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 89-2130

ROLAND M. AND MIRIAM M.,
Plaintiffs, Appellants,

V.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURTFOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, U.S. District Judge]

Before
Selya, Circuit Judge,
Bownes, Senior Circuit Judge.
and Souter,* Circuit Judge.

David Berman for appellants. Richard N. Sullivan, with whom Kenney. Conley. Sullivan & Smith. P.C. was on brief, for appellees.

August 3, 1990

*Judge Souter heard oral argument in this matter, and participated in the semble, but did not participate in the drafting or the issuance of the panel's opinion pursuant to U.S.C. §46(d).

SELYA, Circuit Judge. Appellants Roland and Miriam M. reside in Concord, Massachusetts, with Matthew M., their 15-year-old son. Matthew is "handicapped" within the meaning of the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1982 & Supp. V 1987) (the Act). When a controversy arose over his educational course, the Bureau of Special Education Appeals (BSEA), an adjunct of the Massachusetts Department of Education (MassEd), ruled that the Concord School Committee (Concord) had offered Matthew an appropriate education, but ordered the parents reimbursed for certain interim expenditures. On an ensuing petition for judicial review, the federal district court upheld the qualitative finding and decided that appellants should defray all the contested expenses. We affirm.

I. OVERVIEW

Through the medium of the Act, funds are allocated to assist the states in educating handicapped children. To receive federal money, a state must provide all handicapped children with "a free appropriate public education." 20 U.S.C. §§ 1400(c), 1414(b)(2)(A), 1416; see Burlington v. Department of Educ., 736 F.2d 773, 784-85 (lst Cir. 1984) (Burlington II), aff'd, 471 U.S. 359 (1985)

Substantively, the "free appropriate public education" ordained by the Act requires participating states to provide, at public expense, instruction and support services sufficient "to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982). While a state may not depart downward from the minimum level of appropriateness mandated under federal law, "a state is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children." Burlington II, 736 F.2d at 792; see also 20 U.S.C. § 1401(18)(B). Some states have elected to go considerably above the federal floor. See, e.a., Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir. 1990) (North Carolina requires that opportunity be given to handicapped students to reach their "full potential commensurate with the opportunity given other children"). Massachusetts is such a jurisdiction: the Commonwealth defines an appropriate education as one assuring the "maximum possible development" of the child.

See Stock v. Massachusetts Hosp. School, 392 Mass. 205, 211, 467 N.E.2d 448, 453 (1984); see generally Mass. Gen. L. Ann. ch. 71B, §§ 1-14 (West 1982 & Supp. 1990). Because state standards are enforceable in federal court insofar as they are not inconsistent with federal rights, David D. v. Dartmouth School Comm., 775 F.2d 411, 423 (Ist Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Burlington II, 736 F.2d at 789 & n.19, we refer to, and consider, Massachusetts law where relevant in the pages which follow.

As a procedural matter, the Act commands that states and local education agencies (LEAs) like Concord "assure that handicapped children and their parents . . . are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). The primary safeguard is the obligatory development of an individualized education program (IEP). Rowley, 458 U.S. at 181; Doe v. Defendant I, 898 F.2d 1186, 1189 (6th Cir. 1990); see also 20 U.S.C. 1401(18); Mass. Gen. L. ch. 71B, § 3. That document compiles information and goals anent a particular student's educational progress. It must include statements about the child's current performance, long-term and short-term instructional targets, and objective criteria for measuring the student's advance. See 20 U.S.C. § 1401(19); 34 C.F.R. § 300.346 (1989).

Under the Act, mainstreaming is preferred. States must educate handicapped and non-handicapped children together "to the maximum extent appropriate," see 20 U.S.C. § 1412(5); Rowley, 458 U.S. at 202, and special education must be provided in "the least restrictive environment," see 34 C.F.R. § 300.552(d); Mass. Gen. L. ch. 71B, § 2; Mass. Regs. Code tit. 603, § 112.0 (1986). In Massachusetts, therefore, an IEP must address a handicapped student's needs "so as to assure his maximum possible development in the least restrictive environment consistent with that goal." David D., 775 F.2d at 423.

The development of an IEP requires the participation of a team of individuals, including the parents, the child's teacher, designated specialists, and a representative of the

LEA. See 20 U.S.C. § 1401(19); 34 C.F.R. § 300.344; Mass. Regs. Code tit. 603, § 311.0. Once promulgated, an IEP must be reviewed annually and revised when necessary. See 20 U.S.C. §§ 1414(a)(5), 1413(1)(11); 34 C.F.R. § 300.343(d); Mass. Gen. L. ch. 71B, § 3. If complaints arise, the state must convene "an impartial due process hearing." See 20 U.S.C. § 1415(b)(2). In the Commonwealth, this function is performed by the BSEA. Mass. Gen. L. Ann. ch. 15, § IM (West Supp. 1990). The hearing's outcome is reviewable in either state or federal court, and the reviewing tribunal has broad discretion to grant appropriate relief. See Burlington, 471 U.S. at 369; Doe v. Brookline School Comm., 722 F.2d 910, 917-18 (1st Cir. 1983); Carrington v. Commissioner of Educ., 404 Mass. 290, 294, 535 N.E.2d 212, 215 (1989). The court's focus is upon the educational program which finally emerges from the administrative review process, not the IEP as originally proposed. See Springdale School Dist. v. Grace, 693 F.2d 41, 43 (8th Cir. 1982), cert. denied, 461 U.S. 927 (1983).

II. BACKGROUND

We summarize the factual underpinnings and procedural history of this dispute, presenting additional details as necessary in the course of our opinion.

Matthew has a number of disabilities, including difficulties with visual motor skills, visual perception, visual tracking, fine motor coordination, and gross motor coordination. He is easily distracted and has trouble maintaining and regaining concentration. Consequently, Matthew finds it hard to relate to peers and his real-world functioning is impaired. He often talks to himself, destroys nearby objects, proves unable to get himself ready for school, eats sloppily, and so forth. Nevertheless, he possesses normal intelligence and enjoys significant potential for academic progress.[1]

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[1] The parents assail the district court's unwillingness to find that Matthew also "suffered from Attention Deficit Disorder." They base this assignment of error on the anticipated testimony of Dr. Kinsbourne, a neurologist. Because the district court did not err in excluding Dr. Kinsbourne's testimony, see infra Part V(A), we decline to address the so-called "divergent assessments" of

From kindergarten through fifth grade, Matthew attended the Concord public schools. He was placed in a self-contained classroom with other learning-disabled children. In June 1986, at the end of fifth grade, Matthew's parents unilaterally moved him to Landmark, a private residential school. Some three months later, when the new school year was about to start, the parents rejected Concord's 1986-87 IEP—which called for Matthew's continued placement in public school—instead enrolling him at Landmark for the school year. Concord did not consent.

At the parents' request, the BSEA undertook to determine Matthew's appropriate placement for 1986-87. It was not until June 1987 (after the school year had ended) that the decision was announced. Finding that Matthew's "major presenting problem" was a lack of socialization skills (rather than a learning disability per se), the BSEA, through its hearing officer, made a detailed comparison of Concord as opposed to Landmark, concluding that the former proposed a better program and that Matthew's needs were "not so severe as to dictate a residential placement." Hence, Concord's 1986-87 IEP was adjudged appropriate with the addition of a supplementary, after-school socialization component.[2] Although the BSEA acknowledged that Landmark was not the last agreed-upon placement, it nevertheless ordered Concord to reimburse appellants for first semester costs there.

Disappointed, the parents brought suit. In the district court, they assigned error to BSEA's determination that Concord was an appropriate placement and to its refusal to grant reimbursement of Landmark-related expenses for the complete 1986-87 school year. Concord cross-claimed against MassEd, contending that the BSEA exceeded its

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[2] The socialization component had in fact been engrafted onto the IEP in January 1987. Such post-implementation adjustments are not inconsistent with a finding that the IEP is legally sufficient. See Defendant I, 898 F.2d at 1191; Denton, 895 F.2d at 978; Rettia v. Kent City School Dist., 720 F.2d 463, 466-67 (6th Cir. 1983), appeal dism'd, cert. denied, 467 U.S. 1201 (1984).

authority by ordering any reimbursement.

In the meantime, Concord duly convened a team to prepare Matthew's 1987-88 IEP. When issued on July 29, 1987, it proved to be much the same as the 1986-87 IEP. On August 28, Matthew's parents rejected it. The federal court action was stayed while the BSEA held another round of hearings. On August 19, 1988, through a second hearing officer, BSEA ruled that the 1987-88 IEP was substantively acceptable and that certain claimed procedural defects were excusable. The BSEA also found that Landmark's regimen was too restrictive and did not suitably address Matthew's capacity to be mainstreamed. The decision duly noted Matthew's progress at Landmark over the previous months—but the hearing officer remained "unconvinced that a nexus exist[ed]" between Matthew's improvement and his tenure at Landmark. Appellants thereupon amended the federal court complaint to embrace their assertion that the second BSEA decision was unfounded.

At a trial encompassing both school years, the district court accepted only the administrative record as evidence and prevented the parents from calling certain additional witnesses. After briefing and argument, the judge found that the suggested IEPs were appropriate. She therefore affirmed defendants' placement determinations for 1986-87 and 1987-88, but reversed the BSEA's order that Concord reimburse Landmark's fees for the first semester of the first school year.

III. SCOPE OF JUDICIAL REVIEW

We divide this phase of our analysis into two segments, discussing separately the criteria which govern (I) the district court's review of the state agency's decisions, and (2) appellate review of the district court's judgment.

A. Trial-Level Review.

In this type of case, the law demands that the district court:

> . . . shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2). The court's principal function is

one of involved oversight. "[T]he Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial," and obligates the court of first resort to assess the merits and make an "independent ruling based on the preponderance of the evidence." Burlington II, 736 F.2d at 790; see also Rowley, 458 U.S. at 205; Abrahamson v. Hershman, 701 F.2d 223, 230 (1st Cir. 1983); Burlington v. Department of Educ., 655 F.2d 428, 431 (1st Cir. 1981) (Burlington I). Nevertheless, the district court's task is "something short of a complete de novo review." Colin K. v. Schmidt, 715 F.2d 1, 5 (1st Cir. 1983).

The required perscrutation must, at one and the same time, be thorough yet deferential, recognizing "the expertise of the administrative agency, . . . consider[ing] the [agency's] findings carefully and endeavor[ing] to respond to the hearing officer's resolution of each material issue." Burlington II, 736 F.2d at 791-92. Jurists are not trained, practicing educators. Thus, the statutory scheme binds trial courts to give "due weight" to the state agency's decision in order to prevent judges from "imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207. Hence, the court must render what we have called a "bounded, independent decision[]—bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." Burlington II, 736 F.2d at 791.

Tracking the Act's two overriding concerns, the trial court's assessment of the IEP must address both procedural guarantees and substantive goals. The court must ask two questions:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Rowley, 458 U.S. at 206-07. While the inquiry is necessarily as multifaceted as the Act, the sufficiency of the IEP remains the paramount concern: "The ultimate question for a court under the Act is whether a proposed IEP is adequate and

appropriate for a particular child at a given point in time." Burlington II, 736 F.2d at 788; see also Defendant I, 898 F.2d at 1191.

B. Appellate Review.

We have yet to address explicitly or in detail the standard by which the court of appeals should gauge the district court's ultimate determinations in cases under the Act. We do so today.

The question of whether an IEP is "adequate and appropriate" is a mixed question of fact and law. Accord Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293 (7th Cir.), cert. denied, 109 5. Ct. 308 (1988); Gregory K. v. Longview School Dist., 811 F.2d 1307, 1310 (9th Cir. 1987). Like other mixed questions, measuring the adequacy and appropriateness of an IEP asks nisi prius to determine whether certain facts possess, or lack, legal significance in a given case. See, e.g., Pavlidis v. New England Patriots Football Club Inc., 737 F.2d 1227, 1231 (lst Cir. 1984); Sweeney v. Board of Trustees, 604 F.2d 106, 109 n.2 (lst Cir. 1979) (collecting examples), cert. denied, 444 U.S. 1045 (1980). In short, the district court is required to make an evaluative judgment, applying "a legal standard to a particular set of facts." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976).

Absent a showing that the wrong legal rule was employed, we have rather consistently taken the view that the district court's answer to a mixed fact/law question is reviewable only for clear error. See, e.g., RCI Northeast Services DiV. v. Boston Edison Co., 822 F.2d 199, 202 (lst Cir. 1987); Pavlidis, 737 F.2d at 1231; Sweeney, 604 F.2d at 109 n.2. Our past decisions under the Act have implicitly followed this approach. See David D., 775 F.2d at 415; Burlington II, 736 F.2d at 790; Colin K., 715 F.2d at 6; Abrahamson, 701 F.2d at 227; Doe v. Anria, 692 F.2d 800, 808 (lst Cir. 1982). Clear-error review seems peculiarly apt in the section 1415(e)(2) milieu, as gauging the adequacy and appropriateness of IEPs is a chore inevitably presenting "question[s] whose determination 'require[] delicate assessments . . . [that] are peculiarly ones for the trier of fact.'" New England Anti-Vivisection Soc., Inc. v. United States Surgical Corp., 889 F.2d 1198, 1203 (lst Cir.

1989) (quoting TSC, 426 U.S. at 450). The fact that district courts frequently decide these cases without live testimony, on the basis of the administrative record, does not detract from the wisdom of clear-error review. See, e.g., Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) (rationale underlying clearly erroneous rule applies unabated to findings "based . . . on physical or documentary evidence"); In re Tully, 818 F.2d 106, 109 (lst Cir. 1987) (clear-error standard applies "unconditionally to factfinding emanating from a 'paper' record"); Custom Paper Prod. Co. v. Atlantic Paper Box Co., 469 F.2d 178, 179 (lst Cir. 1972) (the "appellate function does not differ" because no witnesses testified in person). We hold that, in the absence of a mistake of law, the court of appeals should accept a district court's resolution of questions anent adequacy and appropriateness of an IEP so long as the court's conclusions are not clearly erroneous on the record as a whole.

In the case before us, there was no "legal" error. The district court phrased the central issue as "whether the [IEP] addresses the child's special educational needs so as to assure his maximum possible development in the least restrictive environment consistent with that goal." We approve the court's articulation of the governing legal principle. We are relegated, therefore, to ascertaining if the court's ensuing determination that Concord's educational plans for Matthew were "adequate and appropriate" was clearly wrong.

IV. ADEQUACY AND APPROPRIATENESS

We come now to the heart of the matter: the sufficiency of the IEPs proposed by Concord, endorsed by the BSEA, and found satisfactory by the court below. On the premise that one should look before leaping, we deem it advisable to delineate the yardstick by which adequacy and appropriateness must be measured prior to confronting appellants' particularized challenges. We keep in mind that, in cases arising under the Act, the burden rests with the complaining party to prove that the agency's decision was wrong. See Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988); Spielberg v. Henrico County Public Schools, 853 F.2d 256, 258 n.2 (4th Cir. 1988), cert. denied, 109 S.

Ct. 1131 (1989).

A. The Yardstick.

In storming these ramparts, appellants rely heavily on the particulars of Massachusetts' requirement that its special education programs "assure the maximum possible development" of handicapped students. See Mass. Gen. L. ch. 71B, § 2; see also Stock, 467 N.E.2d at 453. This substantive standard is admittedly higher than the federal "educational benefit" floor, Burlington II, 736 F.2d at 789, and makes the formulation and evaluation of IEPs a more complicated task in the Commonwealth than elsewhere. Be that as it may, the parents' claim that their son's academic progress at Landmark necessarily demonstrated the inadequacy of Concord's IEPs will not wash: even under the Massachusetts standard, a program which maximizes a student's academic potential does not by that fact alone comprise the requisite "adequate and appropriate" education. In a nutshell, appellants 'per se approach is far too simplistic.[3]

Let us be perfectly clear. Congress indubitably desired "effective results" and "demonstrable improvement" for the Act's beneficiaries. Burlington II, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficacy of educators' policy choices.[4] See Defendant I, 898

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[3]We take this proposition on appellants' terms, assuming arguendo that Landmark may have been an optimum academic environment. We note in passing, however, that the first hearing officer found Concord's program to be superior, see supra p.6, and the second could fathom no substantial nexus between Matthew's academic progress and Landmark's curriculum, see supra pp. 7-8.

[4]Appellants pounce upon the district court's dictum that Matthew's progress at Landmark was "irrelevant to the question whether the Concord program was appropriate." Although the court's choice of terminology was infelicitous, the context, and other statements in the court's memorandum, make plain that the judge fully understood the evidentiary value of comparisons between Matthew's past and present academic progress.

F.2d at 1190. But, appellants confuse what is relevant with what is dispositive. The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, "related services," 20 U.S.C. § 1401(17), are required to address a student's needs. Irving Independent School Dist. v. Tatro, 468 U.S. 883, 889-90 (1984); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

Among the related services which must be included as integral parts of an appropriate education are "such development, corrective, and other supportive services (including psychological services . . . and counseling services) as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17); see also 34 C.F.R. § 300.13; Mass. Gen. L. ch. 71B, § 1 (defining special needs to be addressed by special education). So long as the means for doing so fit within the statutory compendium, the Act "require[s] that all of a child's special needs must be addressed in the educational plan." Burlington II, 736 F.2d at 788; see also 34 C.F.R. Pt. 300, App. C, Question 44 ("the IEP for a handicapped child must include all of the specific special education and related services needed by the child—as defined by the child's current evaluation"). Thus, purely academic progress—maximizing academic potential—is not the only indicia of educational benefit implicated either by the Act or by state law.

Moreover, appellants' argument misperceives the focus of an inquiry under 20 U.S.C. § 1415(e)(2): the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it Was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. See Rowley, 458 U.S. at 207; Defendant I, 898 F.2d at 1191; Denton, 895 F.2d at 980; Colin K., 715 F.2d at 4. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the

time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C, Question 38 (IEP's annual goals "describe what a handicapped child can reasonably be expected to accomplish"); see also 34 C.F.R. § 300.349. For another thing, the alchemy of "reasonable calculation" necessarily involves choices among educational policies and theories — choices which courts, relatively speaking, are poorly equipped to make. "Academic standards are matters peculiarly within the expertise of the [state] department [of education] and of local educational authorities....Stock, 467 N.E.2d at 455. We think it well that courts have exhibited an understandable reluctance to overturn a state education agency's judgment calls in such delicate areas— at least where it can be shown that "the IEP proposed by the school district is based upon an accepted, proven methodology. Lachman, 852 F.2d at 297. As Chief Justice (then Justice Rehnquist has written:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child. . . . In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).

Rowley, 458 U.S. at 207-08. Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs. See Rowley, 458 U.S. at 202;Defendant I, 898 F.2d at 1191; Stock, 467 N.E.2d at 455.

There is one final basis on which we reject appellants' per se argument. An IEP must prescribe a pedagogical format in which, "to the maximum extent appropriate," a handicapped student is educated "with children who are not handicapped "20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550(b)(1). Congress' stated preference requires, in the

eyes of both federal and state authorities, that education of the handicapped occur in "the least restrictive environment." See 34 C.F.R. § 300.552(d); Mass. Gen. L. ch. 71B, §§ 2, 3. Mainstreaming may not be ignored, even to fulfill substantive educational criteria. "Just as the least restrictive environment guarantee cannot be applied to cure an otherwise inappropriate placement, similarly, a state standard cannot be invoked to release an educational agency from compliance with the mainstreaming provisions." Burlington II, 736 F.2d at 789 n.19; see also Roncker, 700 F.2d at 1063 ("a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming").

Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities. See Rowley, 458 U.S. at 181 n.4; Burlington II, 736 F.2d at 785 n.12; Abrahamson, 701 F.2d at 229 n.10.To determine a particular child's place on this continuum, the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement. See Lachman, 852 F.2d at 296. Assaying an appropriate educational plan, therefore, requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum. Neither side is automatically entitled to extra ballast.

For these reasons, then, comparative academic progress, in and of itself, is not necessarily a valid proxy for, or determinative of, the degree to which an IEP was reasonably calculated to achieve the mandated level of educational benefit.

B. The Substantive Adequacy of the IEPs.

The precepts we have just surveyed frame the inquiry facing the court below: the issue was not whether Concord's program was "better" or "worse" than Landmark's in terms of academic results or some other purely scholastic criterion, but whether Concord's program, taking into account the totality of Matthew's special needs, struck an "adequate and appropriate" balance on the maximum benefit/least restrictive fulcrum. On this issue, the record

sustains the district court's affirmative conclusion.

In the first place, the district court was bound to give "due weight" to the agency's judgment. See Rowley, 458 U.S. at 207. Second, the court obviously agreed with the BSEA hearing officers that Matthew required not only academic help but also socialization training and motor skills assistance. Having canvassed the evidence presented by Matthew's teacher, his parents, and the treating professionals, we cannot say that such a conclusion constituted clear error. As a matter of maximizing Matthew's educational benefit, those special needs were properly considered by the IEP team, notwithstanding the parents' rather singleminded focus on academic results. See Hudson v. Wilson, 828 F.2d 1059, 1063 (4th Cir. 1987); see also Mass. Gen. L. ch. 71B, § 2. The IEP ensured socialization therapy with a psychologist and occupational therapy to improve Matthew's motor skills. Landmark's regimen provided no motor skills training and no specific program of socialization therapy. It follows that Concord could lawfully implement an educational plan which it reasonably considered more appropriate and well-rounded than the Landmark program, especially when its IEP explicitly provided for more, and better diversified, "related services" keyed to Matthew's specific handicaps. See, e.g., Wilson v. Marana Unified School Dist., 735 F.2d 1178, 118283 (9th Cir. 1984).

Additionally, appellants' imprecations all but ignore the mainstreaming requirement. Defendants' 1986-87 IEP proposed a non-residential day program in public school. The plan called for Matthew to be taught in both self-contained classrooms (i.e., with other handicapped students) and in regular classrooms, thus allowing increased mainstreaming in classes like social studies and science where he had attained an acceptable level of performance. In contrast, as a residential school catering to a learning-disabled clientele, Landmark posed a much more restrictive environment and afforded decreased prospects for mainstreaming.

Last but not least, there was considerable room for the BSEA, and the district court, to find that the advantages inherent in the IEP did not severely compromise

educational benefits. Concord's teacher-student ratio was within the range recommended by two professionals who were treating Matthew (Drs. Cushna and Kinsbourne). Its faculty, by many measures, was more experienced and better credentialed than Landmark's. Matthew's progress from 1984 to 1986—a period which had been spent, for the most part, in the Concord public schools—was described by Dr. Cushna as "most astonishing." Although the evidence showed that peer interaction remained a persistent problem, Matthew had been making good academic progress and was gaining self-confidence during the interval immediately before his parents unilaterally changed his placement.

In light of the evidence of Matthew's specific needs and the differences, plus and minus, between the IEP, on the one hand, and the Landmark program, on the second hand, there was substantial proof from which the state agency could rationally conclude that the IEP was adequate and appropriate. Mindful of this evidence, and the weight to be accorded agency determinations in cases under the Act, we cannot say that the district court erred in striking the balance of factors in favor of the BSEA's resolution of the question presented. Where the evidence permits two plausible views of adequacy/appropriateness, the agency's choice between them cannot lightly be disturbed.

To this point, we have discussed the 1986-87 IEP to the virtual exclusion of the 1987-88 IEP. Yet, what we have written about the former applies full bore to the latter. Because the parents insisted that Concord not reevaluate Matthew, the 1987-88 IEP was drafted along the same lines as the 1986-87 plan. It reflected a mixture of self-contained and heterogeneous classes, speech/language training, and occupational therapy. The 1987-88 IEP also included a substantial after-school socialization component designed to bring Matthew into contact with both handicapped and non-handicapped children. One new feature was a specific allotment of time to an academic tutorial program. The alternative — Landmark's program — remained substantially unchanged. For the same reasons as pertained in the previous year, the BSEA permissibly determined Concord's 1987-88 IEP to be appropriate and

substantively adequate. The lower court's ratification of that finding was not clearly wrong.

C. The Procedural Adequacy of the 1987-88 IEP.

The scope of a district court's inquiry into a state's compliance with the procedural requirements of the federal Act encompasses not only the substance of special education, but also the adequacy of the process through which a particular IEP has been created. See Rowley, 458 U.S. at 206; Burlington II, 736 F.2d at 783, 787. In this case, appellants assert that certain procedural defects in the formation of the second IEP were so severe as to render it infirm.[5]

We limn the guideposts. Courts must strictly scrutinize IEPs to ensure their procedural integrity. See Defendant I, 898 F.2d at 1190. Strictness, however, must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective. See id. at 1191. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits. See id.; Denton, 895 F.2d at 979, 982; Burlington II, 736 F.2d at 786.

Appellants urge, without citation to competent authority, that the district court should have shifted the burden to Concord to demonstrate that the alleged procedural defects referable to the 1987-88 IEP were harmless. We disagree. Congress' special emphasis on the provision of procedural protections springs from the hope that an abundance of process and parental involvement will help ensure the creation of satisfactory IEPs acceptable to all concerned. See Rowley, 458 U.S. at 205-06; Burlington II, 736 F.2d at

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[5] To the extent that appellants' procedural critique can be read as addressing the 1986-87 IEP, their complaints are both peripheral and insubstantial. We reject any such procedural challenge, express or implied, without extended comment.

783. Inasmuch as the caselaw makes manifest that the party allegedly aggrieved must carry the burden of proving that the educational agency erred in its substantive judgment, see supra pp. 12-13 and cases cited, logic suggests that the burden be allocated in the same way when a party's attack is garbed in procedural raiment. The court below correctly imposed the devoir of persuasion on the complainants in respect to the harmfulness of the claimed procedural shortcomings. See Kerkam, 862 F.2d at 887; Spielberg, 853 F.2d at 258 n.2; Burlington II, 736 F.2d at 794.

Turning to specifics, appellants' complaints fall into two categories. In terms of output, they cite the use of computerized forms, the lack of a prioritized listing of Matthew's educational objectives, and the bareness of Concord's promise that Matthew would participate in further mainstreaming "when ready." In terms of input, they remonstrate that the IEP relied on information gathered from persons (I) not present at the team meeting, and (2) whose identities were not contemporaneously revealed. The district court concluded that the asserted "procedural defects in the preparation of the 1987/88 IEP taken together were not sufficient to render the IEP inadequate."The conclusion seems unimpeachable.

We believe it is important that, during the team meeting, appellants were given all the information that was ultimately used to fashion the IEP. Such disclosure was plainly sufficient to alleviate any potential problem stemming from the use of preprinted forms or the cursory nature of Concord's comments. Cf., e.g., Defendant I, 898 F.2d at 1191 ("Adequate parental involvement and participation in formulating an IEP . . . appear to be the Court's primary concern in requiring that procedures be strictly followed."). While personalized detail will always be helpful in evaluating an IEP, we decline the invitation to bar LEAs from using standard forms or to insist that every conclusion and prediction contained in an IEP be exhaustively and explicitly documented.

As to input, Massachusetts envisions that the team which writes an IEP will include a "teacher who has recently had or currently has the child" as a student. Mass. Reg.

Code tit. 603, § 311.2. The regulations also provide for input from, inter alia, attending psychologists. Id. § 311.6. Neither Matthew's teacher at Landmark nor the psychologist retained by the parents, Dr. Cushna, attended the team meeting. Yet, while all contributors to the IEP's formation were not at the meeting or identified at that time, the shortfall in attendance seems more attributable to parental reticence than to defendants' errors. The parents, not the school committee, had a relationship with Landmark and with the psychologist. They had removed Matthew from the Concord schools and had specifically asked Concord to refrain from independently testing the child. Thus, the LEA, by virtue of appellants' actions, was in a perilously poor position to remedy the omissions. The law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism.

Further pursuit of this subject would be supererogatory. Particularly in the face of (I) the parents' studied lack of cooperation with ongoing attempts to develop the 1987-88 IEP, and (2) the lack of any indication of "procedural bad faith" on appellees' part, see Burlington II, 736 F.2d at 783, we are satisfied—as was the district court—that Concord fulfilled the essence of its procedural responsibilities. Compare, e.g., Denton, 895 F.2d at 982.

V. REFUSAL TO RECEIVE ADDITIONAL TESTIMONY

The Act tells a reviewing court that it "shall receive the records of the administrative proceedings [and] shall hear additional evidence at the request of a party. . ." 20 U.S.C. § 1415(e)(2). Relying on the general force of this imperative, appellants calumnize the district court for refusing to allow three expert witnesses (Drs. Marcus, Cushna, and Kinsbourne) to testify at trial. The ban, appellants say, invalidates judicial approval of the 1987-88 IEP. Despite appellants' extravagant hyperbole, we think the court's exclusionary order, grounded on the finding that the parents' lawyer "had deliberately withheld that testimony at the administrative hearing," was supportable. Nor did the handling of the matter at the agency level demonstrate an impermissible bias.

A. Basis for Refusal.

The facts are these. Dr. Kinsbourne (a pediatric neurologist) and Dr. Cushna (Matthew's attending psychologist) treated Matthew at least since early 1987. Both men testified in the first round of BSEA hearings, devoted to the 1986-87 IEP. Dr. Marcus, a specialist in child psychiatry, began caring for Matthew in the fall of 1987. All three doctors were treating him when the second set of BSEA hearings, devoted to the 1987-88 IEP, commenced. Appellants' lawyer indicated that he would squirrel the witnesses away until the court trial. The hearing officer implored counsel to adduce the witnesses' testimony and warned him against undermining the administrative process.[6] Despite this request and warning, appellants steadfastly refused to produce the experts,citing an avowed distrust of the BSEA proceedings. Concord tried to subpoena them, but only Dr. Marcus responded. He testified over the parents' protest.

When the case went before the district court, appellants wanted to have this trio of witnesses testify. Defendants objected. The judge granted their motion in limine. Appellants claim that preclusion was unwarranted.

We start with bedrock. A court's customary discretion in evidentiary matters is channeled by the special goals and procedures of the Act. See Burlington II, 736 F.2d at 791. As a means of assuring that the administrative process is accorded its due weight and that judicial review does not become a trial de novo, thereby rendering the administrative hearing nugatory, a party seeking to

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[6] The hearing officer referred to Drs. Cushna and Kinsbourne as "witnesses that should be brought forward before this hearing officer so that this hearing officer as . . . the recognized expert in conducting these matters has the opportunity to have the full picture of this child's needs before her. . . ." The hearing officer specifically warned appellants against any "attempt to undercut the power of the hearing officer by not presenting all the witnesses at this time, and subsequently saving best witnesses for court, those witnesses being whoever the child is seeing for treatment if in fact the child is in treatment."

introduce additional evidence at the district court level must provide some solid justification for doing so.To determine whether this burden has been satisfied, judicial inquiry begins with the administrative record. A district court:

> should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

Id.

Here, the parents were given every opportunity to present the desired testimony at the administrative level. They flatly refused. The unfairness of appellants' gambit is patent—as is the potentially insidious effect of rewarding such a maneuver. In its wisdom, Congress prescribed a two-tier model for these cases. To allow litigants to husband their witnesses, arbitrarily withholding them from the administrative process, would effectively sabotage the statutory scheme.

The hearing officer, echoing these concerns, found categorically that there was no good reason why the witnesses were not brought forward; appellants' strategy was based on an "intent to withhold relevant evidence from the administrative hearing, to demean the statutory role of administrative expertise, and to bypass the due process framework generated by federal and state provisions" in order to reserve the evidence for a judicial trial. Before us, and below, the parents conceded that the core element of this finding was true: they deliberately withheld the witnesses from the second round of BSEA proceedings, preferring to use them in court. And they have come forward with no convincing explanation why their game of cat-and-mouse should have been countenanced or the evidence admitted in the district court.[7]

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[7] Contrary to appellants' jeremiad, "double witness fees" were not a legitimate consideration. Had the parents complied with the usual praxis, their witnesses' testimony would have been presented live before the administrative tribunal, and made fully

We refuse to reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial de novo. Where parties could have, but purposely chose not to, call certain witnesses at the administrative hearing, the district court has discretion to exclude the testimony on judicial review. See Burlington II, 736 F.2d at 790 (it is "an appropriate limit in many cases. . . to disallow testimony for all who did, or could have, testified before the administrative hearing") (emphasis supplied); accord A.W. v. Northwest R-I School Dist., 813 F.2d 158,165 (8th Cir.), cert. denied, 484 U.S. 847 (1987); School Bd. of Prince William County v. Malone, 762 F.2d 1210, 1218 n.12 (4th Cir.1985). In the absence of special circumstances, courts should ordinarily exercise that discretion in favor of excluding the belatedly offered evidence.[8]

To be sure, district courts are empowered to hear testimony not presented before the state agency. Yet, that power is a hedge against injustice. Injustice cannot

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available to the district court by transcription. Only one set of witness fees would have been incurred.

[8] In an effort to show special circumstances, appellants claimed below that all three witnesses would have testified about the harmful effects of a mid-year transfer on Matthew. Because the BSEA's "equitable division" of the 1986-87 school year for purposes of reimbursement could not have been anticipated at the original hearings, and the second round of hearings was restricted to the 1987-88 IEP, appellants argued that their only chance to present this evidence was at trial. Although that conclusion is true as a matter of timing, it overlooks that the initial BSEA decision was designed only as a means of dividing the costs of the 1986-87 school year, not as a finding that Matthew's placement should actually have been altered midstream. In any case, the claim appears to have been abandoned on appeal. See United States v. Zannino, 895 F.2d 1, 17 (Ist Cir.) (issues adverted to in passing, without any attempt at developed argumentation, are waived), cert. denied, 110 S. Ct. 1814 (1990).

credibly be claimed when, as here, parties willfully elect to leapfrog the agency proceedings. While "the legislative history of the Act reflects the understanding that exhaustion is not a rigid requirement . . . litigants are discouraged from weakening the position of the agency by flouting its processes." Ezratty v. Puerto Rico, 648 F.2d at 770, 774 (Ist Cir. 1981); see also Leonard v. McKenzie, 869 F.2d 1558, 1563 (D.C. Cir. 1989) (declining to entertain issue not raised before hearing officer); David D., 775 F.2d at 424 (same). Counsel's unfounded disdain for the administrative process, without more, cannot persuade us to ignore both our own precedents and the elaborate protocol mandated by Congress. We discern no abuse of the lower court's sound discretion in this situation

B. Alleged Bias

Appellants also complain that the second hearing officer's response to their embargo on expert testimony revealed an impermissible conjunction of investigative and adjudicative functions, and that the decision was so infected by the hearing officer's bias against their counsel that it should have carried little or no weight in the district court. This bias, appellants say, violated both their constitutional right to due process and their statutory right to "an impartial due process hearing" under 20 U.S.C. § 1415(b)(2).

We find no merit in these expostulations. The hearing officer's response to counsel's vexatious attitude was not only justified, but entirely proper. There is nothing to indicate that the hearing officer based his decision on actual bias or hostility toward the parents or their counsel. Cf., e.g., Beauchamp v. De Abadia, 779 F.2d 773, 776 (Ist Cir. 1985); O'Brien v. DiGrazia, 544 F.2d 543, 547 (Ist Cir. 1976), cert. denied, 431 U.S. 914 (1977). The record is similarly barren of any credible suggestion that the hearing officer prejudged facts, cf. Withrow v. Larkin, 421 U.S. 35, 49 (1975), or that the BSEA's administrative structure posed "an unacceptable risk of bias," id. at 54. The parents' attorney was permitted to present evidence, examine witnesses, argue, and object—prerogatives which he exercised vigorously. When asserted, objections were fully considered. When rejected, explanations were generally given. No more was required. See Holt v. Virginia, 381 U.S.

131, 136 (1965); In re McConnell, 370 U.S. 230, 236 (1962); Collins v. Marina-Martinez, 894 F.2d 474, 480 (lst Cir. 1990). The parents' procedural rights, constitutional and statutory, were carefully protected in the conduct of the administrative hearings.

VI. REIMBURSEMENT

Despite her explicit finding that the Landmark program was inappropriate for Matthew, the first BSEA hearing officer decided that the parents were nonetheless "entitled to be reimbursed for the Landmark day component including the after school activities, from September through January 1987." The hearing officer based her ruling on appellants' stated confusion over the formulation of the 1986-87 IEP and Matthew's teacher's recommendation to them that Landmark would be an advantageous placement.[9] When answering the parents' complaint, Concord filed a cross-claim against MassEd, asserting that the reimbursement order was improper. The district court agreed. Appellants challenge both the timeliness of the cross-claim and the substance of the court's refusal to order reimbursement

A. Timeliness.

The BSEA rendered its final decision anent the 1986-87 IEP on July 24, 1987. Appellants filed suit in district court on August 21, 1987. On September 10, the parents and Concord filed the first of three successive stipulations enlarging the time to "answer or otherwise respond" to the complaint. When Concord eventually answered on December 11, within the time prescribed by the last of the extensions, it asserted a cross-claim against MassEd challenging the order for partial reimbursement. The parents, despite their acquiescence in the serial late-entry

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[9] Although we doubt whether such informal advice can ever bear the weight of supporting a reimbursement remedy, see, e.g., 34 C.F.R. Pt. 300, App. C, Question 11 ("If a child's teacher(s) feels that the child's placement or IEP services are not appropriate to the child, the teacher(s) should follow agency procedures with respect to (I) calling or meeting with the parents and/or (2) requesting the agency to hold another meeting to review the child's IEP."), we need not decide that question today.

stipulations, now maintain that the cross-claim was time-barred. In the absence of an explicit federal limitation, some courts have looked to analogous state statutes to determine when actions under 20 U.S.C. § 1415(e)(2) are time-barred. See, e.g., Spiegler v. District of Columbia, 866 F.2d 461, 463-64 (D.C. Cir. 1989) (cataloguing cases); Department of Educ. v. Carl D., 695 F.2d 1154, 1157 (9th Cir. 1983). Appellants argue that the Commonwealth's 30-day limit for appeals from administrative actions, Mass. Gen. L. Ann. ch. 30A, § 14(1) (West 1979), ought to apply to Concord's cross-claim. In our judgment, the asseveration offers too little and comes too late.

During the period this case was pending below, appellants filed a pretrial memorandum which did not raise, or question, the timeliness of the cross-claim. When the district court issued its final pretrial order specifying what was before the court for adjudication, see Fed. R. Civ. P. 16(d), (e), timeliness was not listed as a justiciable issue. Appellants did not object to entry of the order. They never moved to amend it. They raised the timeliness defense for the first time in their trial memorandum, filed on the eve of oral argument in the district court. The court, understandably, ignored the eleventh hour attempt to revivify a moribund issue.

The Civil Rules are plain enough: once entered, the final pretrial order "shall control the subsequent course of the action" and "shall be modified only to prevent manifest injustice." Fed. R. civ. P. 16(e). It is, therefore, widely recognized that issues not included in the final pretrial order are waived. See, e.g., Ramirez Pomales v. Becton Dickinson & Co., 839 F.2d 1, 3 (lst Cir. 1988); Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1194 (3d Cir. 1987). The principle is easily explicable. Pretrial orders are valuable accouterments to the judicial process. They define, simplify, and limit the issues to be decided, reduce error, prevent surprise, promote judicial economy, and encourage settlement. See Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 71 (lst Cir. 1982); 3 J. Moore, Moore's Federal Practice, ¶ 16.03 at 16-20 to 16-21 (2d ed. 1989). If pretrial orders are to continue to serve these laudable ends, courts and litigants must ordinarily take

them seriously. A final pretrial order should say what it means and mean what it says.

Where, as here, a district court chooses to stand firm on its final pretrial order, it behooves the court of appeals to "exercise minimal interference," intervening only if the lower court's "broad discretion to preserve the integrity and purpose of the pre-trial order" has been badly mismanaged. Ramirez, 839 F.2d at 3; see also Farr Man & Co. v. M/V Rozita, Nos. 89-1640, 89-1641, slip op. at 12 n.4 (1st Cir. May 22, 1990); Sexton v. Gulf Oil Corp., 809 F.2d 167, 170 (1st Cir. 1987). When a litigant tardily seeks to bring a new issue in from the cold, the reasons for changing the syllabus and whether prejudice may result are factors which inform the district court's discretion. See Petree, 831 F.2d at 1194; Sexton, 809 F.2d at 170. In this instance, those factors counsel that we uphold the district court's refusal to consider the question of timeliness. The planned defense did not surface in appellants' armada until the verge of final argument. The parents point to nothing in the record which might satisfactorily explain their failure to preserve the defense. The prejudice to Concord, had the district court reached beyond the agreed issues, is obvious. Under the circumstances, we find no abuse of discretion. The defense was waived.[10]

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[10] Although we need not reach the issue, we remark that appellants probably were headed down a blind alley in attempting to peg the timeliness of Concord's cross-claim on an adscititious state statute of limitations. Given (I) that the district court seasonably acquired jurisdiction over the agency's entire final decision via the parents' timely appeal, and (2) that Concord merely disputed BSEA's attempt to employ an equitable remedy in fashioning that decision, the necessity for a separate cross-claim was dubious. At any rate, the timeliness of the cross-claim, if germane at all, was likely governed not by a statute of limitations but by the equitable doctrine of laches. See, e.g., Interstate Commerce Comm'n v. B & I Transp. Co., 613 F.2d 1182, 1186 n.6 (1st Cir. 1980) (where party seeks equitable relief not explicitly provided in regulatory scheme, court should apply equitable doctrines such as laches). Under such a test, the cross-claim would not have been time-barred. See, e.g., K-Mart Corp. v. Oriental

B. Propriety of Reimbursement.

Reimbursement is "a matter of equitable relief, committed to the sound discretion of the district court." Burlington II, 736F.2d at 801; see also Brookline, 722 F.2d at 921.Though the courts possess extensive powers to tailor remediation to meet the exigencies of specific cases, reimbursement is usually reserved for parties who prevail at the end of a placement dispute.[11] See Gregory K., 811 F.2d at 1315; Burlington II, 736 F.2d at 799(noting "availability of equitable reimbursement to a prevailing party as a general matter"). In the typical situation,"[r]eimbursement must be denied to the parents if the school system proposed and had the capacity to implement an appropriate IEP." Burlington II, 736 F.2d at 799.

As the case before us aptly illustrates, placement disputes may take years to wind their way through the administrative/judicial labyrinth. Pending completion of adversary proceedings, the Act mandates that ~'unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement. . . ." 20 U.S.C. § 1415(e)(3). While the law does not require parents to keep a child in a program they feel is inappropriate, "it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of State and local school officials, do so at their own financial risk." Burlington, 471 U.S. at 373-74. Parents win the gamble if, and to the extent that, the

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Plaza, Inc., 875 F.2d 907, 911 (Ist Cir. 1989) (discussing criteria for successful laches defense).

[11] There are, of course, exceptions. In Burlington II, for instance, we held that parents who were actually reimbursed pursuant to an administrative order should not be forced to return the funds when a court later determined that reimbursement had erroneously been ordered. 736 F.2d at 800-01. In the instant case, however, no payment was ever effected.

placement they preferred is ultimately adjudged appropriate and the IEP inappropriate. See id., at 370; Brookline, 722 F.2d at 921. Elsewise, the costs arising out of a unilateral placement are not shifted.

Applying these tenets, the district court acted lawfully in reversing the partial reimbursement order. The BSEA stated, supportably, that Landmark was "not [to] be considered the last agreed upon placement" for the purpose of section 1415(e)(3). Therefore, Matthew's parents bore the financial risk of paying Landmark's tuition if they failed to show that Concord's IEP was inappropriate. See Burlington, 471 U.S. at 374 ("If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents [are] barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)."); Burlington I, 655 F.2d at 433. The court below did no more than implement this well settled principle.

VII . CONCLUSION

We need go no further. To recapitulate, the district court did not err in determining that Concord's IEPs were prepared with sufficient procedural safeguards and provided an adequate and appropriate educational plan for Matthew. By the same token, the district court did not misuse its discretion in barring the proffered testimony of witnesses deliberately withheld at the administrative level or refusing to upset the second BSEA decision on the ground of bias. And appellants were not entitled to be reimbursed for any part of the costs stemming from their son's unilateral enrollment in a private residential school since Concord had offered—and the parents had spurned—an adequate, appropriate public education. Finding no legally significant error, substantive or procedural, in these or any other respects, we reject the instant appeal.

Affirmed

UNITED STATES COURT of APPEALS
FOR THE FIRST CIRCUIT

NO. 89-2130

ROLAND M. AND MIRIAM M.,
Plaintiffs, Appellants,

V.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered August ,3 1990

This cause came on to be heard on appeal from the United States District Court for the District of Mas Massachusetts and was argued by counsel.

upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigllano
Clerk.

[cc: Messrs. Berman, Sullivan]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-2130

ROLAND M. AND MIRIAM M.,
Plaintiffs, Appellants,

v.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
Defendants, Appellees.*

BEFORE

Breyer, Chief Judge,
Campbell, Circuit Judge,
Bownes, Senior Circuit Judge,
Torruella, Selya and Cyr, *, Circuit Judges.

ORDER OF COURT
Entered: September 14, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
Francis P. Scigliano
Clerk.

*Circuit Judge David H. Souter did not participate.

[cc: Messrs: Berman and Sullivan]

No. 90-944.

In the

Supreme Court of the United States.

OCTOBER TERM, 1990.

ROLAND M. AND MIRIAM M.,
PETITIONERS,

v.

THE CONCORD SCHOOL COMMITTEE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondent in Opposition.

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No. 90-944.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondent in Opposition.

Statement of the Case.

Matthew M. is a fourteen year old student identified as having special needs pursuant to the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.* (EHA), and Massachusetts General Laws c. 71B. As Matthew is a resident of the town of Concord, the Concord School Committee is responsible for the provision of special education and related services for Matthew.

In August of 1986, the Respondent Concord School Committee (Concord) developed an Individualized Education Plan (IEP) for Matthew M. for the 1986-1987 school year designating a 502.4 substantially separate placement within the public school setting. On September 9, 1986, the Petitioners, Roland M. and Miriam M. (Parents), rejected the proposed IEP and unilaterally placed Matthew in a 502.6 residential program at the Landmark School, a private education facility. On February 9 and 10, March 12, 13, 19 and 23, 1987, the Bureau of Special Education Appeals (B.S.E.A.) of the Respondent Department of Education (DOE) conducted an administrative hearing regarding the appropriateness of the IEP developed by Concord for the 1986-1987 school year.

In May of 1987, in compliance with the procedural requirements of the EHA and M.G.L. c. 71B, Concord developed an IEP specifying a 502.4 placement within the public school setting for Matthew's 1987-1988 school year.

On or about June 11, 1987, the B.S.E.A. issued a written decision wherein it determined that the 1986-1987 Concord 502.4 IEP, with minor modification, was superior to the Landmark 502.6 program in "credentials and experience of staff, methodology, extent and type of services, and opportunity for mainstreaming." *Matthew M.*, Pet. A. at 5a-6a.[1] Moreover, the hearing officer specifically noted that "Matthew's needs are not so severe as to dictate a residential placement and even if they were or become so in the future, . . . Landmark is not an appropriate service provider." *Matthew M.*, *id.* at 7a.

The Parents subsequently filed a complaint in the U.S. District Court pursuant to 20 U.S.C. § 1415, 29 U.S.C. § 794(b) (§ 505(b)) of the Rehabilitation Act of 1973, and 42 U.S.C. § 1983 and § 1988, in which they requested judicial review of

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[1] References to "Pet. A. " are to the Appendix to the Petition for Writ of Certiorari.

that B.S.E.A. determination. *Roland M. et al.* v. *Concord School Committee et al.*, Civil Action No. 87-2107-Z.

On July 10, 1987, the Parents rejected the Concord IEP for the 1987-1988 school year. In compliance with the B.S.E.A. decision concerning the previous school year (which decision was rendered subsequent to the Parents' rejection of Concord's proposed IEP for the 1987-1988 school year), Concord amended its proposed 1987-1988 IEP, which IEP, as amended, was rejected by the Parents in August of 1987. At the commencement of the 1987-1988 school year, despite the B.S.E.A.'s decision concerning the inappropriateness of the Landmark placement for the 1986-1987 school year, the Parents re-enrolled their child in the residential program at the Landmark School.

On or about February 24, March 8, 10, 28, April 6, 29 and May 25, 1988, the B.S.E.A. conducted an administrative hearing regarding the appropriateness of the IEP as amended proposed by Concord for the 1987-1988 school year.

On or about August 24, 1988, the B.S.E.A. issued a written decision wherein it determined that "considering the totality of Matthew's special educational/emotional/social needs, and the calibre, expertise, and competence of his proposed direct service providers at Concord responsible for addressing these special needs, . . . Concord's 1987-1988 program far exceeds his educational program at Landmark School," and that Concord's proposed IEP constituted an appropriate program for Matthew for the 1987-1988 school year. *Matthew M.*, Pet. A. at 51a.

The Parents subsequently amended the Complaint filed in connection with the B.S.E.A. determination with respect to the 1986-1987 school year to include a request for judicial review of the B.S.E.A. determination with respect to the 1987-1988 school year.

On or about January 19, 1989, Concord submitted a motion in limine in opposition to admission of additional evidence, based upon the Parents' deliberate withholding of the additional

evidence during the course of the administrative adjudicatory proceeding regarding the 1987-1988 school year.

On or about March 10, 1989, the District Court, in an exercise of judicial discretion by Judge Rya Zobel, allowed Concord's motion and precluded the Parents from submitting additional evidence to the court during its review of the administrative adjudicatory proceedings concerning both the 1986-1987 and 1987-1988 school years.

On or about October 27, 1989, following receipt of written and oral argument submitted by the parties, the District Court issued a written decision wherein it determined that "the B.S.E.A. decision finding both IEPs appropriate is affirmed and that portion of the decision granting reimbursement is reversed," and thereupon entered judgment on behalf of the Concord School Committee. *Roland M. et al.* v. *The Concord School Committee et al.*, Civil Action No. 87-2107-Z, slip op. at 19 (Mass. D.C. Oct. 27, 1989).

On or about December 2, 1989, following the District Court's denial of the Parents' Motion Under Rule 59 for Rehearing and Amendment of Findings, the Parents appealed to the First Circuit Court of Appeals.

On or about August 3, 1990, following receipt of written and oral argument submitted by the parties, the First Circuit Court of Appeals issued a written decision wherein it determined that 1) "the district court did not err in determining that Concord's IEPS were prepared with sufficient procedural safeguards and provided an adequate and appropriate educational plan for Matthew; 2) . . . the district court did not misuse its discretion in barring the proffered testimony of witnesses deliberately withheld at the administrative level or refusing to upset the second B.S.E.A. decision on the ground of bias; and 3) . . . appellants were not entitled to be reimbursed for any part of the costs stemming from their son's unilateral enrollment in a private residential school since Concord had offered — and

the parents had spurned — an adequate, appropriate public education," and thereupon affirmed the District Court decision. *Roland M.* v. *Concord School Committee*, 910 F.2d 983, 1000 (1st Cir. 1990) Pet. A. at 99a.

Statutory Provisions Involved.

20 U.S.C. § 1415(e)(2)

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint represented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Federal Rules of Civil Procedure

Rule 16(c)-(e) — Pre-Trial Conferences; Sched.; Mgmt.

(c) SUBJECTS TO BE DISCUSSED AT PRE-TRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

1. the formulation and simplication of the issues, including the elimination of frivolous claims or defenses;

2. the necessity or desirability of amendments to the pleadings;

3. the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

4. the avoidance of unnecessary proof and of cumulative evidence;

5. the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

6. the advisability of referring matters to a magistrate or master;

7. the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

8. the form and substance of the pretrial order;

9. the disposition of pending motions;

10. the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

11. such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

. . .

(e) PRETRIAL ORDERS. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Rule 52(a)

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Federal Rules of Appellate Procedure

Rule 35(a)

(a) WHEN HEARING OR REHEARING IN BANC WILL BE ORDERED. A majority of the circuit judges who are in

regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Rules of the Supreme Court of the United States

Rule 10.1(a)-(c)

10.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Massachusetts General Laws

30A:14 Judicial review.

Section 14. Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows: —

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action; as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as provided in section thirty-two of chapter six, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

Summary of the Argument.

I. The First Circuit Court of Appeals correctly applied a "clearly erroneous" standard of review following its determination that the District Court had employed the correct governing legal principle (pp. 10-12).

II. Petitioner can demonstrate no jurisdictional basis for the Court to consider any argument relative to an alleged time-bar of Respondent's cross-claim (pp. 13-15).

III. The District Court, in a proper exercise of its discretion, precluded the introduction of additional evidence on the basis that Petitioner had deliberately withheld that evidence at the administrative level (pp. 16-20).

IV. Rehearing *en banc* is not an appropriate proceeding for alleged inter-circuit conflicts, and requiring such proceedings would directly conflict with the Supreme Court's jurisdiction over such conflicts (pp. 21-22).

Argument.

I. The First Circuit Court of Appeals Applied the Correct Standard in its Review of the District Court Proceeding.

In conducting its review of the decision issued by the United States District Court, the First Circuit Court of Appeals assessed the proper standard of review for both trial-level and appellate review pursuant to the Education of the Handicapped Act (EHA). The Court of Appeals correctly noted that trial level review of administrative proceedings was to be governed by this Court's decision in *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982), and should address both the procedural guarantees and substantive goals of the

EHA. *Roland M.* v. *Concord School Committee*, 910 F.2d 983, 990 (1st Cir. 1990), Pet. A. at 79a. Moreover, the Court of Appeals cited *Burlington* v. *Department of Education*, 736 F.2d 773, 778 (1st Cir. 1984) (Burlington II) *aff'd* 471 U.S. 359 (1985) for the proposition that:

> "The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time."

Roland M., 910 F.2d at 990, Pet. A. at 79a-80a.

In reviewing the District Court's decision regarding the adequacy and appropriateness of the Individualized Education Plan (IEP), the Circuit Court determined that the question posed a mixed question of fact and law, subject to a "clearly erroneous" standard of review:

> Absent a showing that the wrong legal rule was employed, we have rather consistently taken the view that the district court's answer to a mixed fact/law question is reviewable only for clear error.

Roland M., id. at 990, Pet. A. at 80a (citations omitted). The Circuit Court thereupon evaluated the legal standard as applied by the District Court, determined that the correct legal rule had been applied, and upheld the District Court's conclusion regarding the adequacy and appropriateness of the IEP following an application of the clearly erroneous standard to the record as a whole. *Roland M., id.* at 990-991, Pet. A. at 81a.

In applying a "clearly erroneous" standard of review, the Circuit Court adhered to the requirements of Fed. R. Civ. P. Rule 52(a) regarding findings by the Court:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, . . .

Fed. R. Civ. P. Rule 52(a). Rule 52(a) is clearly applicable to any review of findings of fact, unless the lower court applied an improper legal premise in the course of its proceedings. *See Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106, 109 n.2 (1st Cir. 1979); *Grant* v. *Smith*, 574 F.2d 252 (5th Cir. 1978). Unless the Petitioner is able to demonstrate that the District Court applied an improper legal standard, the "clearly erroneous" standard of review is appropriate.

In the Petition for Writ of Certiorari on this issue, Petitioner fails to allege a misapplication of the appropriate legal standard by the United States District Court. Petitioner asserts, however, that a *de novo* standard of review is particularly appropriate where no additional evidence has been received by the District Court. Petitioner's assertion ignores the clear language of Fed. R. Civ. P. Rule 52(a), which states that the clearly erroneous standard applied to findings of fact whether based on oral *or* documentary evidence, and does not require a different standard for review of a documentary record. *See, e.g., Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985); *In re Tully*, 818 F.2d 106, 109 (1st Cir. 1987).

Finally, Petitioner attempts to equate the District Court proceedings with a hearing on a motion for summary judgment, thereby requiring a *de novo* review. The District Court, however, did not conduct a hearing on a motion for summary judgment, but conducted a trial as contemplated by the provisions of 20 U.S.C. § 1415(e)(2). The District Court strictly complied with the requirements of the EHA, and Petitioner should not be granted certiorari on the issue of the proper standard of appellate review, particularly as the Petitioner did not allege or establish a misapplication of the applicable legal standard.

II. There Exists No Jurisdictional Basis for the Court to Consider the Petitioner's Argument that Concord's Cross-Claim was Time Barred.

In order to obtain discretionary review by the Court pursuant to a petition for a writ of certiorari, the Petitioner must demonstrate the existence of special and important reasons for such review. Illustrative of the nature of reasons that may be considered by the Court include:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rules of Supreme Court R. 10.1(a), (c).

In submitting a request for further review on the issue of the timeliness of a cross-claim, Petitioner's request should be based upon the Court of Appeal's resolution of that issue, and should at least demonstrate that the aforementioned special and important reasons exist so as to necessitate further review. Petitioner has misapprehended its obligation to the Court regarding the timeliness issue. In its resolution of the issue, the

Court of Appeals relied upon the plain language of the Federal Rules of Civil Procedure in its review of the District Court's refusal to consider the issue. Rather than addressing the Court of Appeal's invocation of the Federal Rules of Civil Procedure or whether its determination resulted in a decision which satisfied established criteria warranting further review by this Court, Petitioner has alternatively re-argued the issue as presented to the Court of Appeals, and addressed dicta contained within a footnote to the decision.

The Federal Rules of Civil Procedure comprise a set of guidelines which must be adhered to by all parties to litigation commenced within the federal courts. Federal Rules of Civil Procedure Rule 16 governs the conduct of pre-trial conferences and the subsequent production of pre-trial orders. Fed. R. Civ. P. 16(c)-(e). Pursuant to Rule 16, the pre-trial conference is conducted to consider, formulate and simplify the issues, among other matters designed to aid the court in the ultimate disposition of the action. Following the conclusion of the conference, the court issues an order which controls the subsequent course of the action, unless subsequently modified by the court to prevent manifest injustice. *Id.*

In the instant case, the District Court issued a pre-trial order, specifying the issues, following the conclusion of the final pre-trial conference. At no time did the Petitioner seek any modification to the pre-trial order, nor did it provide any notice to Respondent of its intended assertion of a timeliness issue prior to the submission of its brief on the eve of oral argument. The District Court subsequently and correctly refused to consider the timeliness issue; on appeal, the Court of Appeals affirmed the District Court's exercise of its discretion based upon the non-existence of any valid reason for modification to the order, as well as the likely resultant prejudice to the Respondent. The Court of Appeals decision on this issue comports with the resolution of similar issues by the various circuits.

E.g., Petree v. *Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987); *Kendura Oil & Gas, Inc.* v. *Homco, Ltd.*, 879 F.2d 240 (7th Cir. 1989), reh'g denied, August 22, 1989; *Trinity Carton Co., Inc.* v. *Falstaff Brewing Corp.*, 767 F.2d 184 (5th Cir.), reh'g denied, 775 F.2d 301, cert. denied, 475 U.S. 1017 (1985).

Rather than confronting the rationale for the Circuit Court's determination, the Petitioner has attempted to manufacture a reviewable issue upon the assertion that the timeliness question is a jurisdictional issue which may be presented at any time during the course of litigation. The jurisdictional requirements of M.G.L. c. 30A, § 14(1), if indeed applicable to review of administrative adjudicatory proceedings in the federal courts pursuant to § 1415(e)(2) of the EHA, would govern the initiation of the civil action, not the timely filing of cross claims by parties to the civil action. Moreover, Petitioner's reliance on the decision of *Group Insurance Commn.* v. *Labor Relations Commn.*, 381 Mass. 199, 408 N.E.2d 851 (1980) for the proposition that any party seeking to attack any agency decision must file its own timely complaint is patently misplaced; that decision was concerned with lack of standing due to the failure of a party to establish that it was aggrieved by an agency decision. Petitioner has not presented any argument relative to any alleged dichotomy between the various circuits concerning the existence of jurisdictional bars to the assertion of a cross-claim following the timely initiation of a civil action.

III. The District Court's Preclusion of Additional Evidence Does Not Contravene the Procedural Requirements of the EHA, nor the Court's Ruling in *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982).

In *Hendrick Hudson District Board of Education* v. *Rowley*, 458 U.S. 176 (1982), the Court engaged in its initial interpretation of the provisions of the EHA. In assessing the review requirements comprised within the procedural guarantees of the EHA, the Court noted that:

> The fact that § 1415(E) requires that the reviewing court "receive the records of the (state) administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Rowley, 458 U.S. at 206.

The Court did not, however, engage in a determination as to the proper weight to ascribe to the administrative findings, nor did the Court engage in an exposition as to the nature of the additional evidence to be received in review proceedings.

In its interpretation of the additional evidence clause contained within EHA procedural requirements, the First Circuit Court of Appeals determined that in any review proceeding conducted pursuant to the Act:

> . . . the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial.

Burlington II, 736 F.2d at 790.

The Court of Appeals subsequently enunciated a non-exclusive list of reasons that would likely result in supplementation

of evidence; however, the court determined that the starting point for a determination of receipt of additional evidence would be the record of the administrative hearing. According to the court:

> The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. . . . In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. . . .

Burlington II, id. at 791.

In adhering to these precepts, the courts would thus enable parties to present additional evidence at the review level if the reviewing court deemed such evidence to be pertinent and not designed to subvert the administrative hearing process and transform a review proceeding to a trial *ab initio*.

In the instant case, the District Court declined to admit the evidence proffered by the Petitioner on the basis that the evidence had been deliberately withheld at the administrative hearing. Pet. A. at 64a, n.1. The Court of Appeals affirmed that decision, noting that Petitioner had conceded that the evidence had been deliberately withheld so that the testimony could be presented in court as opposed to during the administrative hearing. *Roland M.*, 910 F.2d at 997, Pet. A. at 92a. The Court of Appeals concluded that such a tactic, if permitted, would render the administrative proceedings nugatory, and convert the § 1415(E) review proceedings into a trial *de novo Roland M.*, 910 F.2d at 997, Pet. A. at 93a.

The Petitioner contends that the Court of Appeals decision somehow extends the *Burlington II* limitation of additional evidence, and effectively converts all district court proceedings to a review of the administrative record. Plainly, however, the Court of Appeals determination is based upon the existing standards for ruling on motions for witnesses to testify, as enunciated within the *Burlington II* decision, and does not constitute an extension of those standards. Petitioner's actions at the administrative hearing level clearly implicate all four of the above-mentioned cautionary concerns highlighted by the *Burlington II* decision, and the District Court correctly barred the proffered evidence. As noted by the First Circuit Court of Appeals in its review of the District Court's exclusion of evidence:

> Before us, and below, the parents conceded that the core element of this finding was true: they deliberately withheld the witnesses from the second round of BSEA proceedings, preferring to use them in court. And they have come forward with no convincing explanation why their game of cat-and-mouse should have been countenanced or the evidence admitted in the district court.
>
> We refuse to reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*. Where parties could have, but purposely chose not to, call certain witnesses at the administrative hearing, the district court has discretion to exclude the testimony on judicial review. . . . In the absence of special circumstances, courts should ordinarily exercise that discretion in favor of excluding the belatedly offered evidence.

> To be sure, district courts are empowered to hear testimony not presented before the state agency. Yet, that power is a hedge against injustice. Injustice cannot credibly be claimed when, as here, parties willfully elect to leapfrog the agency proceedings. While "the legislative history of the Act reflects the understanding that exhaustion is not a rigid requirement . . . litigants are discouraged from weakening the position of the agency by flouting its processes." . . . Counsel's unfounded disdain for the administrative process, without more, cannot persuade us to ignore both our own precedents and the elaborate protocol mandated by Congress. We discern no abuse of the lower court's sound discretion in this situation.

Roland M., 910 F.2d at 997, Pet. A. at 92a-94a. (Citations omitted) (footnotes omitted). Rather than contravene the *Rowley* decision, the preclusion of the proffered additional evidence ". . . structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. *Rowley*, 458 U.S. at 206." *Burlington II*, 736 F.2d at 790. By upholding the integrity of the administrative hearing process and preventing the Petitioner from transforming a review proceeding into a trial *de novo*, the lower courts have adhered to the *Rowley* directive that due weight shall be given to the administrative proceedings, and that reviewing courts should not impose their own view of preferable educational methods upon the States. *Rowley*, 458 U.S. at 206, 207.

In its Petition for Writ of Certiorari on this issue, Petitioner cites three separate cases in support of its contention that the *Burlington II* restrictions on receipt of additional evidence conflict with the findings of other courts of appeal. In *Burke County Board of Education* v. *Denton*, 895 F.2d 973, 981 (4th Cir. 1990), the Fourth Circuit Court of Appeals cited the

Burlington II decision with regard to the proper weight to ascribe to the administrative findings, and did not address the *Burlington II* definition of additional evidence. *Burke County Board of Education*, 895 F.2d at 891. In *Barwacz* v. *Michigan Dept. of Education*, 681 F. Supp. 427, 430-431 (W.D. Mich. 1988), a district court decision, the court, in citing the *Burlington II* decision, admitted additional evidence following a determination that the admission of such evidence, in light of the circumstances of that case, would not transform the case into a trial *de novo*. *Barwacz*, 681 F. Supp. at 430-431. In *Metropolitan Government of Nashville and Davidson County* v. *Cook*, 915 F.2d 232, 234 (6th Cir. 1990), although the Sixth Circuit disagreed with the *Burlington II* definition of "additional," the Court admitted additional evidence, in an apparent exercise of its discretion, following its determination that the proffered evidence would not undercut the statutory role of administrative expertise. *Metropolitan Government of Nashville and Davidson County*, 915 F.2d at 235. Rather than conflict with the First Circuit on the issue of additional evidence, therefore, the cited cases may be viewed as conforming with the *Burlington II* guidelines.

Clearly, in its *Roland M.* decision, the First Circuit did not further limit the admission of additional evidence, as alleged by the Petitioner, but merely correctly applied the *Burlington II* standards to the particular circumstances of the within case. In applying those standards, the First Circuit did not conflict with the decision of another United States court of appeals on the same matter, nor did it contravene the *Rowley* court in its delineation of the proper weight to ascribe to administrative proceedings.

IV. Rehearing *en banc* Is Not an Appropriate Proceeding for Alleged Inter-Circuit Conflicts.

Rehearing *en banc* is an unusual proceeding wherein the Court of Appeals, in an exercise of its discretion, determines to rehear a particular case before the full court due to specific extraordinary circumstances. Pursuant to F.R.A.P. Rule 35:

> Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Unless a party is able to demonstrate that the decision in a particular case conflicts with prior decisions in that same circuit, or involves a question of exceptional importance, rehearing *en banc* is not an available remedy.

In its Petition for Writ of Certiorari, Petitioner requests that this Court further extend the grounds for obtaining a rehearing *en banc*, conferring jurisdiction on the Court of Appeals essentially equivalent to that of the United States Supreme Court. Rather than limit a discretionary rehearing *en banc* to situations wherein a Circuit Court perceives a lack of uniformity intra-Circuit, Petitioner seeks mandatory rehearing *en banc* whenever a Circuit Court decision may result in a lack of uniformity inter-Circuit. Petitioner is unable to demonstrate the existence of any of the enumerated grounds for assertion of jurisdiction by the Court on the issue, relying essentially on dicta. Additionally, Petitioner's requested extension of jurisdiction for rehearing *en banc* directly conflicts with the jurisdiction of this Court, which is the only appropriate forum to address uniformity among the various circuits. *See* Rules of Supreme Court, Rule 10.1.

As the First Circuit Court of Appeals, in an exercise of its discretion, properly determined that the grounds for a requested rehearing *en banc* did not exist warranting further review, and Petitioner is unable to demonstrate any reason for assertion of jurisdiction on the issue by this Court, the Court should deny petitioner's application for Writ of Certiorari.

Conclusion.

Based upon the foregoing, the Court should not issue a Writ of Certiorari regarding the decision issued by the First Circuit Court of Appeals.

Respectfully submitted,

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